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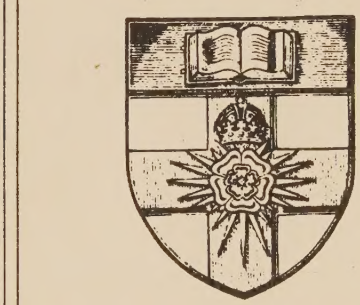

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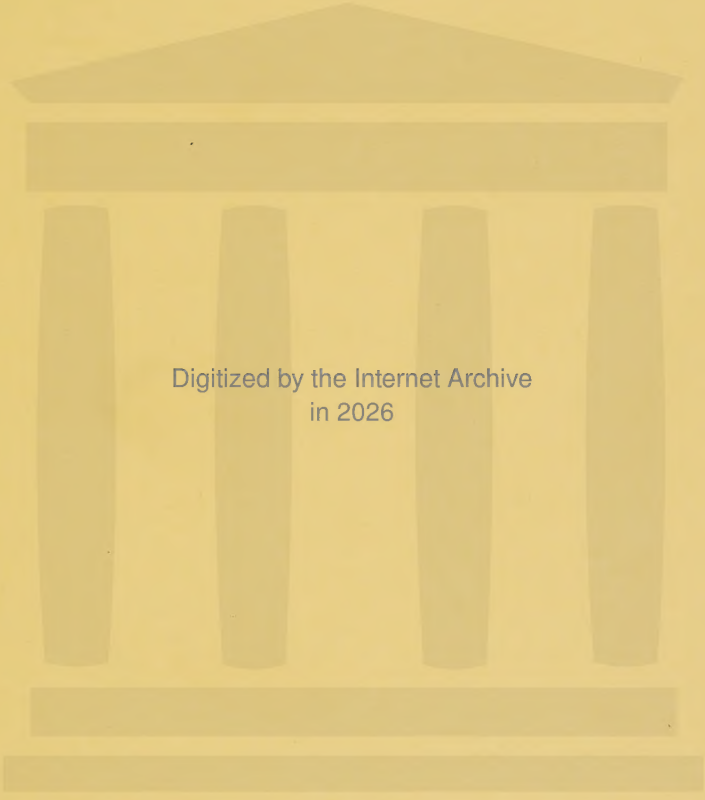
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Revoked as from 1st Feb 1884, except as to fu
may be given effect to not fully acted upo
by the Supl Ct Funds Rules 1884 r 2
(1884) & II. Off Reg. (1 Feb 1884)

CHANCERY FUNDS CONSOLIDATED RULES, 1874.

1874

UNDER THE COURT OF CHANCERY (FUNDS) ACT, 1872,

35 & 36 Vict. c. 44.

Issued 22nd day of December, 1874.

I, The Right Honourable Hugh MacCalmont, Baron Cairns, Lord High Chancellor of Great Britain, with the concurrence of the Commissioners of Her Majesty's Treasury, do hereby, in pursuance of the powers contained in the "Court of Chancery (Funds) Act, 1872," and of every other power enabling me in that behalf, make the following Rules :—

I.—Operation and Construction of Rules.—Definitions.—Revocation of former Rules and General Orders.

Revocation of Chancery Funds Rules, 1872, and substitution and commencement of these Rules.

1. The Chancery Funds Rules, 1872 (1), except the first of the said Rules, are hereby revoked, and these Consolidated Rules are substituted in lieu thereof, and shall come into operation on the 11th day of January, 1875; and they shall be filed in the Report Office of the High Court of Chancery, and may be cited as the "Chancery Funds Consolidated Rules, 1874."

Interpretation of terms.

2. In these Rules, and in orders as herein prescribed and defined, and in directions and certificates issued by the Chancery Paymaster, terms shall have the same meaning as the same terms are

(1) See Law Rep. 7 Ch. xxxv.

ance as repeals & as far as amends
Act Reg in Lunacy of Feb 1884 see Ch Ord r 1
(1884) & II. 50.
Revoked as from 1st Feb 1884 by the Supl Ct Funds Rules

Revoked as from 1st March 1884 by the Supreme Court Rules 1884. r. 2 (W.N. (1884) Pt. II App. No. 9 (1 March 1884))

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defined to have in the said Act, and the term "Court" shall mean the Court of Chancery; and the term "order" shall mean an order of the Court of Chancery, intituled in a cause or matter in the said Court, and made by any Judge or Judges thereof whether sitting in Court or at chambers, or an order of the Court intituled in the matter of the suitors of the Court; or as to payments out of the "Appeal Deposit Account" an order made on a non-attendable petition presented to the Lord Chancellor; and the term "order" shall include a decree, and a report of a Master in Lunacy confirmed by fiat, and thereby receiving the operation of an order under the Lunacy Regulation Act, 1853, 16 & 17 Vict. c. 70; and the term "Chief Clerk" shall mean the Chief Clerk of a Judge of the said Court; and the terms "Chief Clerk's certificate" and "Certificate of a Chief Clerk" shall mean a certificate intituled in a cause or matter in the said Court, and made by a Chief Clerk of a Judge of the said Court, and approved and signed by a Judge thereof; and the term "Bank" shall mean Bank of England or Governor and Company of the Bank of England; and the term "National Debt Commissioners" shall mean the Commissioners for the Reduction of the National Debt; and the term "Chancery Paymaster" shall mean Her Majesty's Paymaster General for the time being, or the Assistant Paymaster General for Chancery business for the time being deputed by the Paymaster General to act on his behalf for Chancery business; and the term "Chancery Pay Office" shall mean Paymaster General's office for Chancery business; and the term "Chancery Pay Office account" shall mean the account at the Bank of the Paymaster General for the time being on behalf of the Court of Chancery; and the term "Chancery Audit Office" shall mean the Chancery branch of the Department of the Comptroller and Auditor General; and words importing the singular number shall include the plural number, and words importing the plural number shall include the singular number, and words importing males shall include females.

In these Rules the term "title of the cause" shall, with respect to causes commenced since 1st November 1852, mean the short title of the cause with the reference to the Record as prescribed by the 48th Rule of the first of the Consolidated Orders of the Court,

in the following form, viz., (A. v. B. 1874. A. 100); and the term "cause or matter" shall include a separate account in a cause or matter, and a matter intituled merely as an account.—(Original Rule 2 amended.) 1874

Abrogation of certain General Orders in Chancery and in Lunacy.

3. The following Rules of the Consolidated Orders of the Court, General Orders of the Court, and General Orders in Lunacy are hereby abrogated, viz.:—The 1st to the 16th Rules, both inclusive, of the first of the said Consolidated Orders; the 5th Rule of the 5th of the said Consolidated Orders; the 3rd to the 9th Rules, both inclusive, of the 23rd of the said Consolidated Orders; the 1st to the 9th Rules, both inclusive, of the 41st of the said Consolidated Orders; the General Orders of 10th January, 1870, as to legacy and succession duty, the General Orders of 25th February, 1868, 17th January, 1870, 1st May, 1871, and 28th August, 1828; and the 29th, 49th, 50th, and 51st of the General Orders in Lunacy of 7th November, 1853.—(Original Rule 3 amended.)

Construction of Rules repeating former Rules, or General Orders, without variation.

4. Every Rule or part of a Rule hereinafter contained which is a repetition without variation of a Rule, or General Order, or part of a Rule or General Order, hereby revoked or abrogated, shall receive the same construction as was put on such revoked or abrogated Rule or Order, or part of a Rule or of an Order, and shall operate, not as a new Rule, but in the same manner as such revoked or abrogated Rule or Order, or part of a Rule or of an Order, would have operated if this consolidation had not been effected.—(See Prel. Cons. Order, Rule 7.)

Construction of Rules repeating former Rules, or General Orders, with variation.

5. Every Rule or part of a Rule hereinafter contained which is a repetition with variation of a Rule, or General Order, or part of a Rule or General Order, hereby revoked or abrogated, shall receive the same construction as was put on such revoked or abrogated Rule or Order, or part of a Rule or of an Order, and shall operate, not as a new Rule, but in the same manner as such revoked or abrogated Rule or Order, or part of a Rule or of an Order, would have operated if this consolidation had not been effected, except so far as such variation indicates a contrary inten-

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tion. And where the variation is of such a character as to be reasonably attributable, not to a variation of intention, but simply to a design to harmonise the style or language of the several Rules and General Orders hereinafter incorporated, such variation shall not be deemed to indicate any such contrary intention.—(See Prel. Cons. Order, Rule 8.)

Construction of existing orders.

6. Orders made before the commencement of the Chancery Funds Rules, 1872, containing directions not then carried into effect, for the payment of money into, or deposit of securities in the Bank with the privity of the Accountant General to the credit of a cause or matter, or for the transfer of securities into the name and with the privity of the Accountant General in trust in a cause or matter, shall be read and construed as if they directed such money or securities respectively to be paid or transferred into, or deposited in Court to the credit of the same cause or matter, and no declaration of trust shall be required to be made with respect to any of such securities.—(Original Rule 4 amended.)

II.—Framing and Printing Orders, and Particulars to be stated.—Duplicates and Office Copies.

Mode of intituling orders and exact titles of accounts to be stated.

7. Every order directing money or securities in Court to be dealt with shall, except in the case of orders made in the matter of the suitors of the Court, be intitutled in the cause or matter (but not in any separate account therein), to the credit of which such money or securities shall be placed in the books at the Chancery Pay Office; and every such order shall state, in the body of such order and not merely by reference to the title of it, the exact title of the cause or matter and separate account, if any, to the credit of which the money or securities dealt with shall be standing; and every order directing money or securities to be brought into Court shall state in the body of such order the title of the cause or matter, and the separate account, if any, to the credit of which such money or securities are to be placed.—(Original Rule 5.)

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Exact amount of funds dealt with, or sources whence derived to be stated.

8. Every order directing money or securities in Court to be dealt with shall express the exact amount of money or securities to be dealt with, whenever it can be ascertained, and the amount of money or securities standing in the books at the Chancery Pay Office, at the date of such order, to the credit of the cause or matter to which the money or securities to be dealt with may be placed, and not merely by reference to another order (except where the name of one person is ordered to be substituted for the name of another person to whom a payment, transfer, or delivery of money or securities, has been directed by a former order); and if the money or securities, or the dividends on securities, to be so dealt with under any such order, shall not be in Court at the date thereof, the source from which such money, securities, or dividends will be derived shall be stated.

And in every case the exact amount of money or securities in Court to be dealt with by the Chancery Paymaster shall be expressed in an order, or in a Chief Clerk's certificate, or in a certificate of a Taxing Master, or in a certificate of a Master in Lunacy; unless such money be payable for legacy or succession duty, or be described as dividends to accrue on securities in Court, or to be brought into Court, or as interest to be credited in respect of money on deposit, or as money to arise by the realization of securities, or as the residue of such dividends, interest, money, or securities respectively, after deducting an amount expressed in an order or in such a certificate, or an amount of securities directed to be realized unascertained at the date of the order directing the realization thereof, or as an aliquot or proportionate part of such dividends, interest, money, securities, or residue respectively; and in the case of residues, and aliquot or proportionate parts, of money, securities, dividends, or interest, the amount of which cannot be ascertained at the date of the order, the amounts may be ascertained in manner provided by Rules 10 and 86.

Money, dividends, or interest directed by an order to be paid into Court, the amount of which cannot be ascertained at the date of the order, may be ascertained in like manner.—(Original Rule 6 amended.)

Directions, when practi-

9. Directions in orders to be acted upon by the Chancery Pay-

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cable, to be expressed in or by reference to a schedule or tabular statement.

master shall, so far as practicable, be expressed in or by reference to a schedule or tabular statement subjoined to the order; and where the actual amounts to be dealt with cannot be ascertained at the date of the order, the aliquot or proportionate parts to be dealt with may be stated in such schedule or tabular statement in words at length, but the total amount of the securities or money, or where the order does not dispose of the whole then the number of the aliquot or proportionate parts dealt with in any such schedule, shall be stated in words at length in the mandatory part of the order.—(Part of Original Rule 7 amended.)

Amount of interest payable to be stated, if practicable, and if not stated how the amount is to be ascertained.

10. When interest is payable in respect of any money in Court, directed by an order to be dealt with by the Chancery Paymaster, the order shall state the rate per centum at which, and (if the day to which interest is payable can be fixed by the order) the day inclusive to which, such interest is computed, and the amount of such interest.

If the day to which interest is to be computed cannot be fixed by the order, the day from which (exclusive) such interest is to be computed shall (except in the case of a computation of subsequent interest from the foot of the certificate of a Chief Clerk, or a Master in Lunacy) be stated in the order, and such interest may be directed to be computed and certified by a Chief Clerk, or a Master in Lunacy, or (where the computation is dependent upon the taxation of costs) by a Taxing Master.

When interest is certified by a Chief Clerk, or a Master in Lunacy, or a Taxing Master, such interest may, unless the order otherwise directs, be computed to a day subsequent to the date of the certificate and to be named therein as the day for payment, so as to allow a reasonable time for doing all necessary acts to enable the payment to be made; and the Chief Clerk, or Master in Lunacy, or Taxing Master, may, if he thinks fit, require a statement in writing of such computation, authenticated by the signature of the solicitor of the person having the carriage of the order, to be produced before preparing the certificate, but no affidavit verifying such computation shall be required.

When the day for payment cannot be fixed by the order, and the interest is not directed to be certified in manner aforesaid, the

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order may direct the interest to the day for payment to be ascertained by an affidavit, or by a statutory declaration under the 5 & 6 Will. 4, c. 62, in which case such interest shall be computed to a day (inclusive) to be named in such affidavit or declaration, as the day for payment, and which day shall not be more than ten days after the day of swearing such affidavit, or making such declaration; and such affidavit or declaration shall be a sufficient authority to the Chancery Paymaster to pay or apply the amount of interest so ascertained in the manner directed by such order.

And in every case in which interest is to be computed, income tax (if any) shall, in making such computation, be deducted therefrom at the rate payable during the time such interest accrues, unless the order otherwise directs; and it shall be stated in every such affidavit or declaration as aforesaid that income tax, if any, has been deducted.—(Substituted for Original Rule 8.)

Documents on which any dealings by the Chancery Paymaster are made contingent to be described.

11. Whenever the dealing by the Chancery Paymaster with money or securities in Court, is, by an order, made contingent upon the execution of some document, the document shall be described, and the parties thereto by whom it is to be executed shall be named in an order, or in a certificate of a Master in Lunacy, or of a Chief Clerk. The execution of such document shall be certified by a Master in Lunacy, or by a Chief Clerk, or may be verified by affidavit, if the order by which such execution is required shall so direct.—(Part of Original Rule 7 amended.)

Persons by or to whom payments and transfers are to be made to be named.

12. Persons who are directed by an order to pay or transfer into or deposit in Court any money or securities, and persons to whom money or securities are directed to be paid, transferred, or delivered, and persons for or during whose lives or other less period, payments are directed to be made, shall be described in the order, or in a certificate of a Chief Clerk, or a Master in Lunacy, or a Taxing Master, by name, and not merely as Plaintiffs or Petitioners, or the like; unless such payments, transfers, or deliveries are to be made to trustees or other persons in succession, or to

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representatives when no probate or letters of administration shall have been taken out at the date of such order or certificate. Bodies Corporate, Companies, or Societies shall be described by their proper titles or designations, and the christian names and surnames, or titles of honour, of all other such persons shall be expressed in words at length and without abbreviations in such orders or certificates, the christian names preceding the surnames. —(Cons. Order 23, Rule 5, amended.)

Time for making periodical payments to be stated.

13. Every order directing the payment of dividends, annuities, or other periodical payments to be made by the Chancery Paymaster shall (except in the case of dividends directed to be paid as they accrue due) specify the time when the first of such payments, and when all subsequent periodical payments, whether quarterly, half-yearly, yearly, or otherwise, shall be made.—(Cons. Order 23, Rule 6, amended.)

Orders dealing with funds to provide for legacy or succession duty, or indicate their liability.

14. Every order directing the payment of money, or the transfer or delivery of securities in Court, in respect of which duty shall be payable to the revenue under the Acts relating to legacy or succession duty, shall, unless such order expressly provides for the payment of the duty, also direct the Chancery Paymaster to have regard to the circumstance that such duty is payable; and when by an order, money or securities, in respect of which such duty may be chargeable, are directed to be invested, carried over, or placed to a separate account, the words "subject to legacy duty" or "subject to succession duty," as the case may be, shall be added in the order to the title of the account thereby directed to be raised. Every order providing for payment, out of money or the proceeds of securities in Court, of any duty payable under the Acts relating to legacy or succession duty shall direct that the amount of such duty shall, upon the requisition of the Commissioners of Inland Revenue, be transferred to the account of the Receiver General of Inland Revenue at the Bank.—(Cons. Order 23, Rule 9, amended.)

Orders to be acted on by Chancery Paymaster to be printed.

15. Every order made after the commencement of these Rules, which is to be acted upon by the Chancery Paymaster (except reports of the Masters in Lunacy, confirmed by fiat, and orders

drawn up by the Registrar in Lunacy), shall be drawn up by and entered with the Registrars of the Court; and every order to be acted upon by the Chancery Paymaster (except the said reports) shall either be wholly printed, or in cases in which printed forms can be used, may be partly printed and partly written; provided that the Registrars may issue any such orders in writing, if of an urgent nature. 1874

The printing of orders shall be under the control of the Registrars, and the orders shall be printed on cream wove, machine made, foolscap folio paper, 18 lbs. per mill ream, or thereabouts, in pica type leaded, with an inner margin about three quarters of an inch wide, and an outer margin about two inches and a half wide, except as to the schedule or tabular statement in any such order contained or referred to, which may be printed in such smaller type as the Registrars shall direct.

Sums occurring in the body of every such order shall be expressed in words; dates occurring therein, and any sums in such schedule or tabular statement as mentioned in Rule 9, shall be expressed in figures instead of words; and each separate direction in such orders shall (as far as may be) be contained in a distinct paragraph; and in all other respects such orders shall be printed in such form and manner as the Registrars shall deem expedient.(1)

Amendment of accidental errors in printed orders.

16. Clerical mistakes or errors arising from any accidental slip or omission in such printed orders may be amended in writing; but no amendment shall be made in any order to provide for a new state of circumstances arising after the date of the order; nor shall any order be amended for the purpose of extending the time thereby limited for making any payment, or transfer into, or deposit in Court of money or securities; and every such amendment shall be stamped by the Clerks of Entries, or by the Record and Writ Clerks, with their official seal, as evidence that the duplicate or record has been also amended.(1)

Registrar's official stamp for authenticating documents.

17. The Registrars of the Court shall be provided with official stamps or seals for the authentication of orders and other documents, and of amendments therein.

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A duplicate to be made of printed orders.

18. The Registrars shall cause a duplicate of every printed or partly printed order to be made at the same time with the original; and the original order shall be passed by a Registrar in the usual way, and stamped with his official seal on every leaf thereof, and be transmitted by him to the Clerks of Entries with the duplicate.

The duplicate order shall be retained and filed by the Clerks of Entries as the record, and the original order when examined and stamped by them, and marked with a reference thereon to the duplicate or record so filed, shall be returned to the Registrar to be delivered out to the solicitor of the party having the carriage of the order.

Additional and office copies of printed orders.

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19. The Registrars may cause to be printed additional copies of printed orders, or printed portions of orders, according to the requirements of the parties or their solicitors, and such additional copies shall be transmitted to the Report Office; and when such printed or partly printed orders have been passed and entered, such additional copies upon being duly completed and signed or certified by one of the Clerks of Records and Writs, and authenticated in the same manner as written office copies of orders, or copies certified pursuant to the Act of the 14 & 15 Vict. c. 99, s. 14, are now signed or certified and authenticated, may be issued as office or certified copies.

Rules as to printing to apply to orders in Lunacy.

20. Rules 15 and 16 shall, so far as applicable, extend to and include orders in Lunacy to be acted upon by the Chancery Paymaster, drawn up by the Registrar in Lunacy, but the printing thereof shall be exclusively under the direction and control of the Registrar in Lunacy; and such orders shall be entered by him in the manner prescribed by section 100 of the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70.)

III.—Copies of Orders, and other Documents, to be sent to Chancery Audit Office.

Office copy of orders to be sent from Report Office.

21. An office copy of every order drawn up by the Registrars of the Court to be acted upon by the Chancery Paymaster, duly

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signed and authenticated in the manner described in Rule 19, shall be transmitted by the Clerks of Records and Writs to the Chancery Audit Office; and in case of any amendments being made in the order, such office copy shall, upon production thereof to the Clerks of Records and Writs, be likewise amended. 1874

Office copies of certificates and other documents to be acted upon by the Chancery Paymaster to be sent.

22. An office copy of every certificate of a Chief Clerk, or of a Taxing Master, or of a Master in Lunacy, which is to be acted upon by the Chancery Paymaster, and an office copy of all directions contained in the Report of a Master in Lunacy confirmed by fiat, which are to be acted upon by the Chancery Paymaster, shall, when requested, be transmitted by the Clerks of Records and Writs, or by the Registrar in Lunacy, as the case may be, to the Chancery Audit Office.

Office copies of orders in Lunacy to be sent by Registrar in Lunacy.

23. An office copy of every order in Lunacy to be acted upon by the Chancery Paymaster when signed and sealed or stamped with the seal of the Registrar in Lunacy, as required by sections 100 and 101 of the Lunacy Regulation Act, 1853, and section 29 of the Lunacy Regulation Act, 1862 (25 & 26 Vict. c. 86), shall be transmitted by the Registrar in Lunacy to the Chancery Audit Office.

Office copies of affidavits and declarations to be transmitted.

24. An office copy of any affidavit, or of any statutory declaration filed as provided in Rule 86, which may be received in evidence by the Chancery Paymaster, shall, when requested, be transmitted by the Clerks of Records and Writs to the Chancery Audit Office.

IV.—Bringing Funds into Court.

Bringing funds into Court on request.

25. Money and securities may be paid or transferred into, or deposited in, Court, and be placed in the books at the Chancery Pay Office to the credit of a cause or matter, on a direction to be obtained from the Chancery Paymaster, upon the written request of the person desirous of so paying, transferring, or depositing, or of his solicitor, without an order; but no such payment, transfer, or deposit shall be so made to a separate account in a cause (except to a security for costs account), unless such separate

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account has been directed to be opened by an order, and such request shall be filed in the Report Office. This Rule shall not apply to money, or securities, directed by an order to be paid or transferred into, or deposited in, Court, nor shall it apply to money or securities payable or transferable into Court, in pursuance of an Act of Parliament, or a General Order of the Court, by which some particular authority is required to enable the payment, transfer, or deposit to be made.—(Original Rule 10 amended.)

Request to contain reference to record.

26. Every request for a direction for payment or transfer into, or deposit in, Court of money or securities to be placed to the credit of a cause commenced since 1st November, 1852, shall contain the title of the cause and the reference to the record as cited in Rule 2, and the correctness of such reference shall be authenticated by the official seal of the Clerks of Records and Writs being impressed on such request.—(Original Rule 11.)

Persons may bring funds into Court though time limited by order has expired.

27. A person directed by any order to make a payment or transfer into, or deposit in, Court, shall be at liberty to make the same without further order, notwithstanding the order may not have been served, or the time thereby limited for making such payment, transfer, or deposit may have expired; and if any further sum of money has by reason of such default become payable by such person for interest, or in respect of dividends, he shall be at liberty to pay into Court such further sum upon a request as provided by Rule 25; provided that any such subsequent payment, transfer, or deposit shall not affect or prejudice any liability, process, or other consequences which such person may have become subject to by reason of his default in making the same within the time so limited. The time for making any such payment, transfer, or deposit may be also, if necessary, extended by a supplemental order, referring to the former order, but without repeating the directions for such payment, transfer, or deposit. Such supplemental order may be made on an application to the Judge at Chambers.

Proceedings on payment in of money or

28. When money or securities are to be paid into, or deposited in, Court, such payment or deposit shall be made with the privity

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of the Chancery Paymaster, and the Chancery Paymaster shall issue a direction to the Bank to receive and place the same to the credit of the Chancery Pay Office account; and such direction shall specify the title of the cause or matter to which such money or securities are to be placed in the books at the Chancery Pay Office; and upon such money or securities being so paid or deposited, the Bank shall cause a receipt to be given for the same, and shall send such direction to the Chancery Pay Office, with a certificate thereon, that the money or securities therein specified have been received, and placed to the credit of the Chancery Pay Office account.—(Original Rule 9 amended.) 1874 deposit of securities.

29. When securities are to be transferred into Court, such transfer shall be made with the privity of the Chancery Paymaster, and the Chancery Paymaster shall issue a direction for the transfer to be made to the account of the Paymaster General for the time being on behalf of the Court of Chancery; and such direction shall specify the title of the cause or matter to which such securities are to be placed in the books at the Chancery Pay Office; and upon such securities being so transferred, the Bank, or Body Corporate, or Company, in whose books the transfer of such securities is made or registered, shall send such direction to the Chancery Pay Office, with a certificate thereon, that the securities therein specified have been transferred to the said account. —(Original Rule 15 amended.) Proceedings on transfer of securities into Court.

30. When any such direction as is mentioned in the last two preceding Rules with a certificate thereon that the amount of money or securities therein mentioned has been so paid, transferred, or deposited, shall be received at the Chancery Pay Office, the Chancery Paymaster shall file a certificate of such payment, transfer, or deposit, and shall therein state the title of the cause or matter to which such amount of money or securities has been placed in the books at the Chancery Pay Office; and an office copy of such certificate of the Chancery Paymaster shall be received as evidence of the payment or transfer into, or deposit in, Court therein mentioned having been made.—(Original Rule 16 amended.) Receipt and certificate of payment, deposit, or transfer.

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Conditional lodgment of money at the Bank in urgent cases.

31. When it is desired to bring money into Court without waiting the time necessary to obtain a direction for the Bank to receive such money it may be lodged at the Bank to the credit of a Chancery Suspense Account (subject to being dealt with as hereinafter mentioned, and not otherwise), upon a written application signed by the person desiring to lodge the same, or his solicitor, and addressed to the Bank, specifying the amount, and the title of the cause or matter in Chancery in respect of which it is desired to be lodged, and upon such lodgment being made one of the cashiers of the Bank shall give a certificate that the amount has been lodged to the credit of a Chancery Suspense Account; and in every case the person making such lodgment, or his solicitor, shall forthwith bespeak the direction for the Bank to receive the money in the manner provided by Rule 28, and produce such direction and certificate at the Bank, for the purpose of having the money so previously lodged transferred to the Chancery Pay Office account, and placed in the books at the Chancery Pay Office to the credit of the cause or matter mentioned in such direction, and the receipt mentioned in the said Rule 28 shall thereupon be given for such money.—(Original Rule 12.)

When money paid in under Lands Clauses Act, 1845 (8 Vict. c. 18, s. 69), disability to be stated.

32. Money hereafter paid into Court pursuant to the 69th section of the "Lands Clauses Consolidation Act, 1845," in respect of lands in England or Wales, shall be placed in the books at the Chancery Pay Office to the credit of Ex parte the promoters of the undertaking, in the matter of the special Act (citing it), as directed by the said Lands Clauses Consolidation Act, 1845, and some words shall be added in each case briefly expressive of the nature of the disability to sell and convey, by reason of which the money shall be so paid in, as stated in the request for the direction to receive the money.—(Original Rule 13).

Money paid in under the Copyhold Acts to be placed to a separate account.

33. Money hereafter paid into Court pursuant to the Copyhold Acts shall be placed in the books at the Chancery Pay Office to the credit of "Ex parte the Copyhold Commissioners," as directed by the said Acts, and in addition thereto, to the account of the particular manor in respect of which the money shall be so paid

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in; and in the request for a direction to receive such money the name and locality of such particular manor shall be stated.—(Original Rule 14.) 1874

Persons bringing funds into Court under Trustee Relief Act (10 & 11 Vict. c. 96) to file affidavit.

34. A trustee or other person desiring to pay money or transfer securities into, or to deposit securities in, Court, under the Act 10 & 11 Vict. c. 96, shall file an affidavit, entitled in the matter of the same Act, and in the matter of the trust, and setting forth—

(1.) His own name and address.

(2.) The place where he is to be served with any petition, summons, or order, or with notice of any proceeding relating to such money or securities.

(3.) The amount of money and description and amount of securities which he proposes to pay or transfer into, or deposit in, Court, and the credit to which he wishes it to be placed; and if such money or securities are chargeable with legacy or succession duty, a statement whether such duty or any part thereof has or has not been paid.

(4.) A short description of the trust, and of the instrument creating it.

(5.) The names of the persons interested in or entitled to the money or securities, and their places of residence, to the best of his knowledge and belief.

(6.) His submission to answer all such inquiries relating to the application of the money or securities paid or transferred into, or deposited in, Court under the same Act, as the Court or Judge may make or direct.

(7.) A statement whether the money so to be paid into Court, or the dividends on the securities so to be transferred into, or deposited in, Court, and all accumulations of dividends thereon, are desired to be invested in Consolidated £3 per Centum Annuities, or Reduced £3 per Cent. Annuities, or New £3 per Cent. Annuities, or whether it is deemed unnecessary so to invest the same or to place the same on deposit.

The Chancery Paymaster, on production of an office copy of

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any such affidavit, shall give the necessary directions for such payment, transfer, or deposit to the account of the particular trust mentioned in the affidavit.

The regulations contained in the General Order of the Court of the 16th day of May, 1862, for the printing of affidavits to be used on the hearing of a cause, shall be applicable to affidavits filed under this Rule, and the Chancery Paymaster shall not act upon an office copy of any such affidavit, filed after the commencement of these Rules, which is not so printed.—(Cons. Order 41, Rules 1 and 2 amended.)

Credit to which money and dividends received by the Bank are to be placed.

35. Any principal money or dividends received by the Bank in respect of securities standing to the Chancery Pay Office account shall be placed in the books at the Chancery Pay Office, in the case of principal money, to the credit to which the securities whereon such money arose were standing at the time of the receipt thereof, and in the case of dividends, to the credit to which the securities whereon such dividends accrued were standing at the time of the closing of the transfer books of such securities previously to the dividends becoming due.

V.—Payment of Money, and Sale, Transfer, or Delivery of Securities, out of Court.—Conversion of Government Securities.—Application of Dividends and Interest.

Funds in Court to be dealt with only in pursuance of an order.

36. Subject to Rules 46, 47, 48, 49, 62, 65, and 66, securities in Court shall not be sold, transferred, or delivered out, and money in Court shall not be paid out or invested in securities, and money or securities in Court shall not be carried over, and a certificate shall not be issued for the sale, transfer, or delivery of securities in Court, unless in pursuance of an order, or in the case of an investment of money or application of dividends, of a direction contained in a certificate of a Master in Lunacy as authorized by the Lunacy Regulation Act, 1853, or by any General Orders made thereunder.—(Original Rule 17 amended.)

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Chancery Paymaster may defer acting on orders until he receives a request.

37. When an order, or a certificate of a Master in Lunacy, directs the carrying over of money or securities in Court, or the investment, or placing on deposit (subject to Rule 71), or payment out, of money in Court, or of dividends to accrue on securities in Court, the Chancery Paymaster may defer giving effect to such direction until a request in writing to give effect thereto has been left at the Chancery Pay Office, but it shall be the duty of the solicitor for the person having the carriage of such order or certificate to leave it and such request at the Chancery Pay Office without unnecessary delay.—(Original Rule 23 amended.)

Mode of payment of money out of Court.

38. When money in Court is to be paid out (except in the cases provided for by Rules 41, 57, and 58, and by the 4th and 5th of the General Orders in Lunacy of 10th January, 1870), the Chancery Paymaster shall cause a cheque or other sufficient authority or direction for the payment of the same to be issued. Such cheque or authority or direction for payment shall state the title of the cause or matter in the books at the Chancery Pay Office to which the money paid is to be debited, the date of the order or other authority in pursuance of which, and the name of the person to whom the payment is to be made, or so much of the particulars of such payment as the Chancery Paymaster may deem necessary; and such cheque or authority or direction, duly endorsed by the payee named therein or his lawful attorney, or an acknowledgment of receipt signed by such payee or his attorney, shall be a good discharge to the Chancery Paymaster for the amount therein mentioned.—(Original Rule 18 amended.)

Continuation of certain periodical payments.

39. Money in Court periodically payable at the commencement of the Chancery Funds Rules, 1872, shall continue to be payable by the Chancery Paymaster in pursuance and on the authority of the entries of the cheques for periodical payments in the receipt books in the Accountant General's Office, or of such other documents as the Accountant General had been accustomed to use in the preparation of such cheques, without the production of the orders and other documents in pursuance whereof such payments are made, being necessary.—(Original Rule 19 amended.)

Revoked as from 7 March 1884 by the Supt of Funds Rules 1884 r 2 (W.N (1884) Pt II App No 9 (8 March 1884))

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Renewal of unpaid cheques of the Accountant General.

40. Cheques which before the commencement of the Chancery Funds Rules, 1872, had been signed by the late Accountant General or by any of his predecessors, but have not been paid at the commencement of these Rules, shall be a sufficient authority to the Chancery Paymaster to cause payments to be made to the same persons and of the same amounts as are named in such cheques, without the production of the orders or other documents in pursuance whereof such cheques were so signed, being necessary.—(Original Rule 20 amended.)

Payments to official persons to be made by transfer.

41. When money in Court is payable to the Receiver General of Inland Revenue (in any case not provided for by Rule 57), the National Debt Commissioners, the Ecclesiastical Commissioners for England, the Official Trustees of Charitable Funds, the Official Liquidator of any Company, or any other official persons for whom an account is kept at the Bank, the order shall direct the amount so payable to be transferred, upon the requisition of the official persons to whom it is due, to the proper account (citing it), at the Bank, of such official persons. And the Chancery Paymaster, shall, upon receiving such requisition, direct the Bank to write off from the Chancery Pay Office account the amount so payable, and to place it to the account at the Bank mentioned in such order, and shall debit therewith the proper account in the books at the Chancery Pay Office.—(Original Rule 21 amended.)

Particulars to be expressed in certificates for sale, transfer, or delivery of securities.

42. Every certificate for the sale, transfer, or delivery of securities in Court shall express the exact amount of money to be raised by sale, or the exact amount and description of securities to be sold, transferred, or delivered out; and no such certificate shall be issued by a Master in Lunacy, except on the production of an office copy of the report of a Master in Lunacy confirmed by fiat; nor by the Registrar in Lunacy, except on the production of an office copy of the order in Lunacy; nor by a Registrar of the Court, except on the production of the original order, or an office copy thereof, if the absence of the original order shall be accounted for to the satisfaction of such Registrar.—(Original Rule 29.)

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Sale of securities.

43. When securities in Court are to be sold, and a Registrar of the Court, or a Master or Registrar in Lunacy, has issued a certificate authorizing the sale, the Chancery Paymaster shall issue a direction to the Bank to receive the proceeds of such sale, and to place them to the Chancery Pay Office account, and shall specify in such direction the title of the cause or matter to the credit of which such proceeds are to be placed in the books at the Chancery Pay Office, and such title shall be the title of the cause or matter to the credit of which the securities were standing at the time of such sale, and the Bank, or Body Corporate, or Company, in whose books, or with whom, the securities to be sold are standing or deposited, shall, upon the production of the receipt from the Bank for the proceeds of the sale, and of the certificate of a Registrar of the Court, or a Master or Registrar in Lunacy, authorizing such sale, countersigned by the Chancery Paymaster, cause the transfer or delivery of the securities necessary to complete the sale to be made by their proper officer.—(Original Rule 25 amended.)

Conversion (in lieu of sale) of certain Government securities to be directed.

44. When a specific amount of Government securities in Court consisting of either Consolidated £3 per Centum Annuities, or Reduced £3 per Centum Annuities, or New £3 per Centum Annuities, of not less than £1000, is required to be realized, the order, instead of directing a sale of such securities, shall direct the same to be converted into cash, unless the Court on pronouncing such order otherwise directs; and a Registrar of the Court or a Master or Registrar in Lunacy shall issue a certificate for the transfer of such securities to the account of the National Debt Commissioners on behalf of the Court of Chancery, as provided in Rule 84.—(Original Rule 28 amended.)

Transfer of securities out of Court.

45. When securities in Court are to be transferred or delivered out, and a Registrar of the Court, or a Master or Registrar in Lunacy, has issued a certificate authorizing such transfer or delivery, the Chancery Paymaster shall issue a direction for such transfer or delivery, and specify in such direction the title of the cause or matter to the credit of which such securities are standing in the books at the Chancery Pay Office, and the amount and

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description of the securities to be transferred or delivered, and the name of the person to whom the transfer or delivery is to be made; and upon the receipt of such direction, and of the certificate of a Registrar of the Court, or a Master or Registrar in Lunacy, authorizing such transfer or delivery, countersigned by the Chancery Paymaster, the Bank, or Body Corporate, or Company, in whose books, or with whom, such securities shall be standing or deposited, shall cause such transfer or delivery to be made by their proper officer, and shall send such direction to the Chancery Pay Office, with a certificate thereon that the transfer or delivery therein mentioned has been made to the person named therein.—(Original Rule 26 amended.)

Application of dividends accruing on securities transferred.

46. When securities in Court are directed to be transferred or delivered out, dividends accruing thereon subsequently to the date of the order directing the transfer or delivery (when the amount of the securities to be transferred or delivered is specified in such order, or if not so specified then subsequently to the time when the amount of such securities shall be ascertained), shall be paid to the persons to whom the securities are to be transferred or delivered, unless such order otherwise directs. When securities in Court are directed to be realized, and the whole of the proceeds paid out or carried over in one sum, or in aliquot or proportionate parts (except when the realization is to raise a specific sum of money), any dividends accruing on such securities subsequent to the date of the order directing the realization (if the amount of such securities is specified in the order, or if not so specified, then subsequently to the time when such amount shall be ascertained), shall be added to such proceeds, and applied in like manner therewith, unless such order otherwise directs.—(Original Rule 27 amended.)

When such dividends have been invested.

47. When under an order directing the transfer or delivery of securities, dividends accruing thereon would be payable to the persons to whom such securites are directed to be transferred or delivered, and pursuant to a general or other previous order such dividends have been invested, the securities purchased with such dividends shall, unless otherwise directed, be transferred or de-

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livered, and any dividends accrued in respect thereof shall be paid to such persons.—(Part of Original Rule 27 amended.) 1874

48. In every case (other than that provided for by the last preceding Rule), when by an order dividends are directed to be dealt with so that the same ought not to be invested, and subsequently to the date of such order, such dividends, or any part thereof, shall have been invested, the securities purchased with such dividends shall, unless otherwise directed, be sold, and the proceeds of such sale and any dividends accrued in respect of such securities shall be applied in the same manner as the dividends so invested would have been applied under such order, if they had not been so invested.—(General Order, 25th day of February, 1868, amended.) When dividends otherwise applicable have been invested.

49. In the cases provided for by the last two preceding Rules, the Registrars of the Court, and the Masters and Registrar in Lunacy, may, upon production to them of a certificate of such investment as therein mentioned, issue certificates for transfer, delivery, or sale, according to the provisions of the said Rules.—(Part of Original Rule 27 amended.) Certificates for transfer, sale, or delivery under the last two preceding Rules.

50. When subsequently to the date of an order dealing with money in Court such money shall have been placed on deposit, or when dividends accruing subsequently to the date of an order under which such dividends are applicable shall have been placed on deposit, the same when withdrawn from deposit, and any interest credited in respect thereof, shall, unless the order otherwise directs, be applied in the same manner as such money or dividends would have been applied had the same not been so placed on deposit. Application of money or dividends placed on deposit after date of order dealing therewith.

51. When an order directs money in Court to be invested, and subsequently to the date of such order the money shall have been placed on deposit, interest accruing in respect of such money shall be applied in the same manner as the dividends arising from such investment are directed to be applied.—(Original Rule 47 amended.) Application of interest on money placed on deposit after date of order directing its investment.

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Funds ordered to be paid or transferred to women who afterwards marry.

52. When money in Court is directed to be paid, or securities in Court are directed to be transferred or delivered, to a woman who is not married at the date of the order, and such woman shall marry before payment of such money, or transfer or delivery of such securities, such money, if it does not in the whole exceed £200 of principal money, or £10 in annual payments, or such securities if they, or the aggregate of such securities and money, do not exceed in value £200 sterling, may be paid, transferred, or delivered to such woman and her husband, upon proof of the marriage, and upon an affidavit of such woman and her husband that no settlement, or agreement for a settlement, whatsoever has been made or entered into before, upon, or since their marriage, or in case any such settlement, or agreement for a settlement, has been made or entered into, then upon an affidavit of such woman and her husband identifying such settlement, or agreement for a settlement, and stating that no other settlement, or agreement for a settlement, has been made or entered into as aforesaid, and an affidavit of the solicitor of such woman and her husband, that such solicitor has carefully perused such settlement, or agreement for a settlement, and that, according to the best of his judgment, such money or securities are not, nor is any part thereof, subject to the trusts of such settlement, or agreement for a settlement, or in any manner comprised therein or affected thereby; and upon proof of the marriage and production of such affidavits, the Registrar may issue a certificate authorizing the transfer or delivery of such securities to such woman and her husband.—(Cons. Order 1, Rules 1, 2, and 3.)

Payment, transfer, or delivery to representatives of deceased persons or co-partners.

53. When a person to whom payment of money in Court or transfer or delivery of securities in Court is directed shall appear to be entitled thereto as real estate, or as trustee, executor, or administrator, or otherwise than in his own right or for his own use, the fact that he is entitled to the same as real estate, or the character in which he is so entitled, shall be stated in the order or in the certificate of a Chief Clerk, or of a Taxing Master, or of a Master in Lunacy.

And when money in Court is payable, or securities in Court are transferable or deliverable to any person named or described in

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an order, or in a certificate of a Chief Clerk, or of a Taxing Master, or of a Master in Lunacy (except to a person therein expressed to be entitled to such money or securities as real estate, or to be entitled thereto as a trustee, executor, or administrator, or otherwise than in his own right, or for his own use), such money or securities, or any portion thereof for the time being remaining unpaid or untransferred or undelivered, may, unless the order otherwise directs, on proof of the death of such person, whether on or after the date of such order, be paid, or transferred, or delivered to the legal personal representatives of such deceased person, or to the survivors or survivor of them.

And when money in Court is by an order directed to be paid to any persons described in an order or a certificate of a Chief Clerk, or of a Taxing Master, or of a Master in Lunacy, as co-partners, such money may be paid to any one or more of such co-partners. —(Original Rule 22 amended.)

Payments, transfer, or delivery to surviving co-partners or representatives.

54. When money in Court is payable to any persons as co-partners, or when money in Court is payable, or securities in Court are transferable or deliverable to any persons as legal personal representatives, such money or securities, or any portion thereof for the time being remaining unpaid, untransferred, or undelivered, may, upon proof of the death of any of such co-partners or representatives, whether on or after the date of the order directing such payment, transfer, or delivery, be paid, transferred, or delivered to the survivors or survivor of them.—(Cons. Order 1, Rule 5.)

Registrar's certificates for transfer or delivery under last two preceding Rules.

55. In the case of securities transferable or deliverable under either of the last two preceding Rules, the Registrar may (upon proof of the death of any of such representatives, issue a certificate authorizing the transfer or delivery of such securities to such representatives, or to the survivors or survivor of them.—(Cons. Order 1, Rule 7.)

Within what time probate or letters of administration must have been granted.

56. No money or securities shall, under Rules 53 and 54, be paid, transferred, or delivered out of Court to the legal personal representatives of any person under any probate or letters of

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administration purporting to be granted at any time subsequent to the expiration of six years from the date of the order directing such payment, transfer, or delivery, or in case such money consists of interest or dividends from the date of the last receipt of such interest or dividends under such order.—(Cons. Order 1, Rules 8 and 9, amended.)

Payment of legacy or succession duty.

57. The Chancery Paymaster, before acting upon an order for the payment, transfer, or delivery of money or securities in respect of which legacy or succession duty is (under Rule 14) stated to be payable, shall require the production of the official receipt for such duty, or a certificate from the proper officer of the payment thereof. And for better security against the payment or transfer by the Chancery Paymaster of any money or securities chargeable with any such duty without the duty being first paid, the Chancery Paymaster, on receiving notice from the proper officer that the duty is payable, shall cause a memorandum to be made in his books in conformity with such notice. And when an order shall have been left at the Chancery Pay Office, for the purpose of giving effect to any direction for the transfer of such duty to the account of the Receiver General of Inland Revenue at the Bank, together with the requisition of the Commissioners of Inland Revenue for such transfer, and such other evidence as may be necessary for verifying the amount of such duty, the Chancery Paymaster shall direct the Bank to transfer the amount of such duty to the said account, and shall debit such amount to the proper account in the books at the Chancery Pay Office.—(General Order, 16th January, 1870, amended.)

Carrying over fees of taxation.

58. When costs are directed to be paid out of money in Court, or out of the proceeds of securities in Court, the Taxing Master shall certify the amount of the fees of taxation payable in respect of such costs, unless he shall certify that such fees are included in the costs as taxed. The Chancery Paymaster shall carry over the amount so certified to be payable from the account to which such money or proceeds are placed to a separate account in the books at the Chancery Pay Office for fees of taxation; and the amount so carried over shall from time to time, as the Treasury may direct,

be paid to the account of Her Majesty's Exchequer.—(General Order, 10th January, 1870, Rules 2 and 3, amended.) 1874

59. In acting on orders directing any annuity or maintenance to be paid, or any other periodical payments to be made, out of the dividends which have accrued since the 5th day of April, 1871, or which may hereafter accrue on securities in Court, or hereafter to be in Court, and in respect of which dividends income tax shall have been deducted, the Chancery Paymaster shall draw only for so much of the sums directed by such orders respectively to be paid as shall remain after making a deduction therefrom at the same rate as the Bank shall certify to have been deducted from such dividends for income tax, except in cases in which such sums shall be directed to be paid without making any such deduction.—(General Order, 1st day of May, 1871, amended.) Deduction of income tax on payments of or out of dividends.

VI.—Investment of Money.

60. When money in Court is, in pursuance of an order, to be invested in specified securities, the Chancery Paymaster shall direct the money to be paid to the broker conditionally upon his causing such securities to be transferred or deposited to the account of the Paymaster General for the time being on behalf of the Court of Chancery, and the cheque or authority or direction for payment of such money shall specify the title of the cause or matter, to the credit of which the securities purchased are to be placed in the books at the Chancery Pay Office. Proceedings on investing money in securities.

The Bank, or Body Corporate, or Company, in whose books or with whom the transfer or deposit of such securities shall be made or registered, shall cause a certificate of such transfer or deposit to be issued; and such a certificate purporting to be issued by the Bank, or Body Corporate, or Company aforesaid, shall be sufficient evidence, for all purposes that such transfer or deposit as therein mentioned has been actually made; and the securities so transferred or deposited shall be placed in the books at the Chancery Pay Office to the same credit as that to which the said money was standing at the time of such investment, unless the order

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authorizing such investment otherwise directs.—(Original Rule 24 amended.)

Investment of accruing dividends under an order.

61. When an order directing the investment from time to time of dividends accruing on securities in Court, or to be transferred into Court, or directed to be purchased with money in Court, or to be paid into Court, is left at the Chancery Pay Office, together with a request for the purpose of having such direction for investment of dividends carried into effect, the Chancery Paymaster shall, without any further request, from time to time, until he shall receive a request or notice of an order to the contrary, invest such dividends, if amounting to or exceeding £40 half yearly, together with all accumulations of dividends thereon, as soon as conveniently may be after they shall accrue due and have been received, in the particular description of securities named in the order directing such investment.—(Cons. Order 1, Rule 12, amended.)

Purchase of exchequer bills or bonds.

62. When money in Court is by an order directed to be invested in exchequer bills or exchequer bonds, and when exchequer bills or exchequer bonds are, in pursuance of an order, deposited in Court to the credit of any cause or matter, any principal money or interest which may thereafter be received and paid into the Bank in respect of such bills or bonds, or of any such bills or bonds to be purchased with principal money or interest in pursuance of this Rule, or in respect of any such bills or bonds for which the same may be exchanged, shall from time to time, as the same shall be so received and paid into the Bank, be also invested by the Chancery Paymaster, without any further request, unless such order otherwise directs, or until he receives a request or notice of a further order to the contrary, in exchequer bills or exchequer bonds which shall be placed to the same credit.—(Cons. Order 1, Rule 13.)

Bank to renew exchequer bills and to receive principal and interest of securities when paid off.

63. When and so often as any exchequer bills or other securities now or hereafter to be deposited at the Bank to the credit of the Chancery Pay Office account shall be in course of payment, the Bank shall, without any direction from the Chancery Paymaster,

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cause all such bills or other securities so in course of payment to be delivered to one of the cashiers of the Bank, who is to receive the interest due thereon, and in the case of exchequer bills to exchange the same for new bills, if new bills are issued, or otherwise to receive the principal money and interest due on such of the said bills so in course of payment as cannot be exchanged, and pay such interest or principal and interest (as the case may be) into, and deposit all such new bills in the Bank to the Chancery Pay Office account. 1874

And the Bank is forthwith after every such exchange or receipt of principal or interest to certify to the Chancery Paymaster, without any direction from him for that purpose, the numbers, dates, and amounts of the exchequer bills so exchanged or paid off, and also the numbers, dates, and amounts of the new bills taken in exchange, and the amount of the interest, or principal money and interest (as the case may be), received on each bill or set of bills, and upon receiving such certificate the Chancery Paymaster shall place such new bills and such principal money and interest to the credit in the books at the Chancery Pay Office of the cause or matter to which the bills so exchanged or paid off were placed.—(General Order, 28th day of August, 1828.)

64. A sum of money in Court less than £40 shall not be invested in securities, except in the cases provided for by Rules 65 and 66. Limit of amount to be invested.

This Rule shall extend to the investment of dividends accruing on securities in Court which have been or may be directed or requested to be invested; and such dividends when amounting to less than £40 half-yearly are (subject to Rules 37, 65, 66, and 73) to be placed on deposit.—(Original Rule 38 amended.)

65. The dividends accruing on securities purchased as mentioned in the 11th Rule of the 1st of the Consolidated Orders of the Court (abrogated by Rule 3 of these Rules), previously to the commencement of the Chancery Funds Rules, 1872, may, when or so soon as they amount to or exceed £10, be invested in like Money paid in under 36 Geo. 3, c. 52, may be invested on request.

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manner as the same would have been invested if the said 11th Rule had not been abrogated.

A sum of money amounting to or exceeding £40 paid into Court after the commencement of these Rules, in pursuance of the Act of 36 Geo. 3, c. 52, s. 32, shall, upon a written request of the person paying it in, or of his solicitor, or upon a written request made by or on behalf of a person claiming to be entitled thereto or interested therein, be invested (without an order) in Consolidated £3 per Centum Annuities; and the dividends accruing in respect thereof, when or so soon as they shall amount to or exceed £10, shall be from time to time invested in like annuities, if so requested either in the original request or in a subsequent request. And if such money shall have been placed on deposit before such request shall be left at the Chancery Pay Office, such money and any interest to be credited in respect thereof, if amounting to £40, shall, upon a like request, be withdrawn from deposit and invested as before mentioned.—(Original Rule 40 amended.)

Investment of money paid in under the Trustee Relief Act.

66. Notwithstanding the abrogation of the 3rd Rule of the 41st of the Consolidated Orders of the Court (by Rule 3 of these Rules) all dividends subject at the commencement of these Rules to be invested in pursuance of the said 3rd Rule of the said Order, may, when or so soon as they amount to or exceed £10, be invested as if the said 3rd Rule had not been abrogated.

When the affidavit referred to in Rule 34 contains a statement that it is desired that the money intended to be paid into Court in pursuance of the Act of the 10 & 11 Vict. c. 96, or the dividends accruing on the securities intended to be transferred or deposited in pursuance of the said Act, and the accumulations thereon, shall be invested in Consolidated £3 per Centum Annuities, or Reduced £3 per Centum Annuities, or New £3 per Centum Annuities, the Chancery Paymaster shall (if or so soon as such money shall amount to or exceed £40, or such dividends shall amount to or exceed £10) invest the same respectively in Consolidated £3 per Centum Annuities, or Reduced £3 per Centum Annuities, or New £3 per Centum Annuities, without any order

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or further request for that purpose. But if such money does not amount to £40, the Chancery Paymaster shall, subject to Rule 73, as soon as conveniently may be, place such money on deposit without a request for that purpose, unless such affidavit contains a statement that it is deemed unnecessary to place such money on deposit, or unless notice in writing be left at his office of an order having been made, or of an intended application to the Court, affecting such money, securities, or dividends. 1874

Investing or placing on deposit stayed or discontinued on request.

67. In all cases, upon a request in writing by a solicitor acting on behalf of any person claiming to be entitled to or interested in money or securities in Court, that such money or the dividends or interest accruing on any specified securities, or on any specified sum of money on deposit, may not be placed on deposit or invested, being at any time left at the Chancery Pay Office, the Chancery Paymaster shall not place such money on deposit, or shall be at liberty to cease to place on deposit or invest any more dividends or interest accruing on such securities or sum of money on deposit, until he has had notice that the Court has made some order in that behalf.—(Original Rule 41 amended.)

VII.—Money on Deposit and Interest thereon.

In what cases money will be placed on deposit.

68. Subject to any exceptions in these Rules, money in Court paid in before the commencement of the Court of Chancery (Funds) Act, 1872, and not already placed on deposit (other than money paid in pursuant to the Copyhold Acts, or to the 69th section of The Lands Clauses Consolidation Act, 1845), and money arising by the sale, conversion, or payment off of securities in Court, or dividends accruing on securities in Court, or money brought over from the credit of some other cause or matter, or otherwise placed, either before or after such commencement, to the credit of a cause or matter in the books at the Chancery Pay Office, shall be placed on deposit on a request signed by any person claiming to be interested in such money, or by his solicitor; and, subject as aforesaid, all money hereafter to be paid into Court shall be placed on deposit without a request for that purpose. —(Original Rule 33 amended.)

Revoked as from 1st March 1884 by the Supr. Ct. Funds Rules 1884 r 2 (W.N. (1884) Pt 1 p 191 dated 1 March 1884

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Money not to be placed on deposit in certain cases.

69. If a direction in an order dealing with money in Court otherwise than by directing it to be placed on deposit, whether such money has been paid in before or since the commencement of the Court of Chancery (Funds) Act, 1872, is brought under the notice of the Chancery Paymaster, or if a request in writing by a solicitor acting on behalf of a person claiming to be entitled to or interested in money in Court, paid in after the commencement of the same Act, that such money may not be placed on deposit, is left at the Chancery Pay Office, such money respectively shall not be placed on deposit, but the person making such request may at any time withdraw the same, and by a like request in writing require the money to be placed on deposit.—(Original Rule 34 amended.)

Time for placing money on deposit.

70. The placing on deposit of money paid into Court after the commencement of these Rules shall not be deferred beyond the 15th or the last day of the month in which it shall be paid into Court, whichever day shall first happen after such payment, or in the case of money paid into Court on the last day of a month, the placing on deposit shall not be deferred beyond the 15th day of the following month; and when a request to place money in Court on deposit shall be left at the Chancery Pay Office, the money shall (except in the case provided for in Rule 71) be so placed on the day succeeding the day on which such request shall be so left (which last-named day shall be the date inserted in such request).—(Original Rule 35 amended.)

As to placing on deposit cash arising from conversion of Government securities.

71. When an order directs the conversion into cash of any of the Government securities mentioned in Rule 44, and the whole of the money arising thereby to be placed on deposit, such money shall be deemed to have been placed on deposit (without a request for that purpose) on the day on which such conversion shall be effected.—(Part of Original Rule 52 amended.)

Exclusion of money paid in under 9 & 10 Vict. c. 20, or to the appeal deposit account.

72. Money in Court paid in pursuant to the Act 9 & 10 Vict. c. 20, intituled "An Act to amend an Act of the second year of Her present Majesty, providing for the custody of certain moneys paid in pursuance of the Standing Orders of either House

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of Parliament by subscribers to works or undertakings to be effected under the authority of Parliament," or of any Act amending the same, or money in Court paid into the Appeal Deposit Account, shall not be placed on deposit. — (Original Rule 36.) 1874

No sum less than £10 to be on deposit.

73. A less sum of money than £10 shall not remain or be placed on deposit; and if the amount of money on deposit to the credit of a cause or matter at the commencement of these Rules is less than £10 it shall be withdrawn from deposit, at or as soon as conveniently may be after such commencement, without a request for that purpose.—(Original Rule 37 amended.)

Withdrawal of money on deposit.

74. When an order containing directions dealing with money on deposit, or with money which after the date of the order has been placed and still remains on deposit, is brought to the Chancery Pay Office to have such directions acted on, such money, or so much thereof as may be sufficient to meet the requirements of the order, may, on a request in writing signed by a person claiming to be entitled thereto or interested therein, or by a solicitor acting on his behalf, be withdrawn from deposit and applied as directed by the order, subject, as to the investment of money, to Rule 64.—(Original Rule 39.)

Limit of time for withdrawal from deposit after request.

75. When money on deposit is by an order directed to be dealt with, such money shall be withdrawn from deposit as soon as may be after a request in writing for such withdrawal has been left at the Chancery Pay Office, and such withdrawal shall not be deferred beyond a week after the leaving of such request.—(Original Rule 48.)

No interest computed on a fraction of one pound.

76. Interest upon money on deposit shall not be computed on a fraction of one pound.—(Original Rule 42.)

For what periods interest is to be computed.

77. Except as in this Rule otherwise provided, interest upon money on deposit shall accrue by half calendar months, and shall not be computed for any less period. The periods from the 1st to the 15th of a month, both days inclusive, and from the 16th to the

Revoked as from 7th March 1884 by the Sup Ct Funds Rules 1884 r 2 (W.N (1884) Pt II App No 9 (7 March 1884))

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last day of a month, both days inclusive, shall, for the purpose of computing such interest, be reckoned as half calendar months; and such interest shall begin on the first day of the half calendar month next succeeding that in which the money is placed on deposit, and shall cease from the last day of the half calendar month next preceding the withdrawal of the money from deposit: Provided that when a sum of money in Court amounting to not less than £500, shall be hereafter placed on deposit, pursuant to a request in writing by or on behalf of a person claiming to be interested therein, and shall remain on deposit undealt with until the 1st of April or the 1st of October next succeeding the day on which it is placed on deposit, interest shall begin on the day inclusive next succeeding such day of placing on deposit.—(Original Rule 43 amended.)

When interest is to be credited.

78. Interest which has accrued for or during the half years ending respectively the 31st of March and the 30th of September in every year on money then on deposit shall, on or before the 20th days of the months respectively following, be credited by the Chancery Paymaster to the cause or matter to the credit of which such money shall be standing, on every such half yearly day. And when money on deposit is withdrawn from deposit, except as to money withdrawn during the first fifteen days of the months of April and October respectively, the interest thereon which has accrued and has not been credited shall, at the time of withdrawal, be credited to the cause or matter to the credit of which the money is then standing.—(Original Rule 44 amended.)

Mode of calculating interest in certain cases on parts of money withdrawn.

79. When money on deposit to the credit of a cause or matter consists of sums which have been placed on deposit at different times, and an order is made dealing with the money to the credit of such cause or matter, and part of such money has to be withdrawn from deposit for the purpose of executing such order, the part or parts of the money dealt with by such order last placed and remaining on deposit at the time of such withdrawal shall, for the purpose of computing interest, be treated as so withdrawn, unless the order otherwise directs.—(Original Rule 45.)

...oked as from 1st March 1884 by the Sup. Ct. Funds
...les 1884 r 2 (W.L. (1884) p. 11 Hyp. No. 9 (1 March 1884)

80. Until a direction in an order dealing with interest on money on deposit, credited to a cause or matter as having become due on either of the half yearly days mentioned in Rule 78, has been brought under the Chancery Paymaster's notice, such interest shall, when or so soon as it amounts to or exceeds £10, be placed on deposit, and for the purpose of computing interest upon it shall be treated as having been placed on deposit on the last half yearly day on which any such interest became due.—(Original Rule 46 amended.) 1874. Placing of interest on deposit.

VIII.—TRANSACTIONS WITH NATIONAL DEBT COMMISSIONERS.

81. When the money to the credit of the Chancery Pay Office account is, in the opinion of the Chancery Paymaster, in excess of the amount required for the purpose of making current payments, he shall transfer the amount of such excess from the Chancery Pay Office account to the account at the Bank of the National Debt Commissioners on behalf of the Court of Chancery, and shall notify such transfer to the said Commissioners.—(Original Rule 49 amended.) Surplus of money in Court to be transferred to National Debt Commissioners.

82. When the money to the credit of the Chancery Pay Office account is, in the opinion of the Chancery Paymaster, insufficient for the purpose of making current payments, the National Debt Commissioners, upon a request in writing of the Chancery Paymaster (and within one week of the receipt of such request), shall transfer from their account at the Bank on behalf of the Court of Chancery to the Chancery Pay Office account, the amount of money specified in such request.—(Original Rule 50 amended.) Deficiency of money in Court to be made good by National Debt Commissioners.

83. The Chancery Paymaster shall, after the 31st March and the 30th September in every year, certify to the National Debt Commissioners the amount of interest on money on deposit, which has accrued for or during the half years respectively ending on those days; and the National Debt Commissioners, as soon thereafter as may be, shall place such amount to the credit of the account kept by them of money placed in their hands by the National Debt Commissioners to give credit for interest on money on deposit.

Revoked as from 1st March 1884 by the Supr Ct Funds Rules 1884 r 2 (W.N (1884) Pt 1 Appx No 9 (1 March 1884))

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Chancery Paymaster on behalf of the Court of Chancery, and shall cause the amount of income tax (if any) chargeable on such interest to be paid to the account at the Bank of the Receiver General of Inland Revenue.—(Original Rule 51 amended.)

Proceedings on conversion of Government securities into cash.

84. Upon receipt of a certificate of a Registrar of the Court, or of a Master or Registrar in Lunacy, authorizing the conversion of Government securities into cash, by transfer to the National Debt Commissioners (as provided by Rule 44), the Chancery Paymaster shall send to the said Commissioners a notification that such transfer will take place, with a request that the amount of cash which is the value of such securities according to the Bank average price thereof on the day of transfer, or (if there shall be no such average price on that day) on the next following day on which there shall be such an average price thereof, may be placed to the account to be kept by the said Commissioners of money placed in their hands by the Chancery Paymaster on behalf of the Court of Chancery, such value to be determined by the said Commissioners in the manner provided by the Rule next following. The Chancery Paymaster, upon receiving a certificate from the said Commissioners that the amount of cash which is the value of such securities, determined as aforesaid, has been placed to the account of money placed in their hands as aforesaid, shall credit the account in the books at the Chancery Pay Office upon which such securities were standing at the time of the transfer, with such amount.—(Part of Original Rule 52 amended.)

Mode of ascertaining value of Government securities converted or exchanged.

85. The money value of the Government securities of the descriptions mentioned in Rule 44 shall, for the purposes of the said Act and of these Rules, or of an order when equivalent amounts are to be dealt with, be ascertained according to the Bank average price of the securities appearing in the account transmitted to the Comptroller General of the National Debt Office by the cashiers of the Bank, a copy whereof shall be sent daily by the Bank to the Chancery Pay Office.—(Original Rule 53.)

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IX.—Miscellaneous.

1874

Chancery Paymaster may act on affidavits or statutory declarations in certain cases.

86. When evidence is required by the Chancery Paymaster for the purpose of ascertaining the amounts of any residue or aliquot or proportionate part of money or securities dealt with by an order, or for otherwise carrying into effect the directions of an order, he may, without any direction in such order for that purpose, receive and act upon an affidavit, or upon a statutory declaration under the Act of 5 & 6 Will. IV. c. 62, instead of an affidavit, and every such statutory declaration shall be filed in the Report Office when the Chancery Paymaster shall consider it necessary.—(Original Rule 57 amended.)

Chancery Paymaster may furnish particulars of funds in Court.

87. The Chancery Paymaster, upon a request in writing made by or on behalf of a person claiming to be interested in money or securities standing in the books at the Chancery Pay Office to the credit of a cause or matter stated in such request, may, in his discretion, issue, for the information of a Judge or an officer of the Court, a certificate of the amount and description of such money or securities, and such certificate shall have reference to the morning of the day of the date thereof, and not include the transactions of that day, and the Chancery Paymaster shall notify on such certificate the dates of any orders restraining the transfer, sale, delivery out, or payment, or other dealing with the securities or money in Court to the credit of the cause or matter mentioned in such certificate, and any charging orders, affecting such securities or money, of which respectively he has had notice, and with respect to any restraining or charging orders hereafter to be made, the names of the persons to whom notice is to be given, or in whose favour such restraining or charging orders have been made.

And when a cause or matter has been inserted in the list referred to in Rule 91, the fact shall be notified on the certificate relating thereto.—(Part of Original Rule 30 amended.)

Chancery Paymaster may issue transcripts of his accounts.

88. Upon a request in writing made by or on behalf of a person claiming to be interested in money or securities standing in the books at the Chancery Pay Office to the credit of a

Revoked as from 1st March 1884 by the Supr. Ct. Funds Rules 1884 & 2 (W.N. (1884) Pt. II Aysp. No. 9 (1 March 1884))

1874

cause or matter stated in such request, the Chancery Paymaster may, in his discretion, issue a transcript of the account in the said books in respect of such cause or matter; and if so required by the person to whom it is issued, such transcript shall be authenticated at the Chancery Audit Office.—(Part of Original Rule 30 amended.)

Chancery Paymaster may certify as to purchases, sales, or other dealings with securities.

89. When securities have been purchased, sold, transferred, or delivered out, or money or securities have been carried over, or otherwise dealt with in the books at the Chancery Pay Office, the Chancery Paymaster may in his discretion issue a certificate thereof, upon a request in writing made by or on behalf of any person claiming to be interested in such money or securities.—(Original Rule 31 amended.)

Chancery Paymaster may give other information as to transactions.

90. The Chancery Paymaster may in his discretion, on a request in writing, supply such information with respect to any transactions in the Chancery Pay Office as may from time to time be required in any particular case.—(Original Rule 32 amended.)

List of funds undealt with to be published triennially.

91. As soon as conveniently may be after the 1st of September, 1875, and after the same day in every succeeding third year, a list shall be prepared by the Chancery Paymaster, and filed in the Report Office, and a copy thereof shall be inserted in the *London Gazette*, and exhibited in the several Offices of the Court, of the titles of the causes and matters in the books at the Chancery Pay Office (other than the causes or matters referred to in Rule 92) to the credit of which any securities, or any money amounting to or exceeding £50, may be standing, which money or the dividends on which securities have not been dealt with by the Accountant General or by the Chancery Paymaster (otherwise than by the continuous investment or placing on deposit of dividends) during the fifteen years immediately preceding such 1st of September, and no information shall be given by the Chancery Paymaster respecting any money or securities to the credit of a cause or matter contained in any such list until he has been furnished with a statement in writing by a solicitor requiring

oked as from 1st March 1884 by the Sup Ct Funds
Ses 1884 x 2 (W.N. (1884) p. 11 Appx No 96 (March 1884))

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such information, of the name of the person on whose behalf he applies, and that, in such solicitor's opinion, the applicant is beneficially interested in such money or securities.—(Original Rule 54 amended.)

Transfer of small balances to a separate account.

92. As soon as conveniently may be after the 1st of September, 1875, and the same day in each succeeding year, the Chancery Paymaster shall carry over to a separate account in his books for causes and matters on which the balances do not exceed £5 the balances of money and securities standing in such books to the credit of the causes or matters on which such balances of money and securities do not together amount to £5, and on which the money or securities shall not have been dealt with during the preceding five years. When an order dealing with money or securities carried over under this Rule is brought to the Chancery Pay Office to be acted upon, the Chancery Paymaster shall carry back such money or securities and any dividends accrued thereon to the credit of the cause or matter from which they were so carried over, and shall deal therewith as directed by such order.—(Original Rule 55 amended.)

Solicitors to insert their names and addresses on documents left in the Chancery Pay Office.

93. Every order or request that may be left at the Chancery Pay Office, and every statutory declaration, or other document required to be retained there for the purpose of carrying into effect an order, may be printed or written, and shall have printed or written thereon the name and address of a solicitor.—(Original Rule 58.)

Titles of accounts not to exceed thirty-six words.

94. The length of the title of any account hereafter directed by an order, or requested pursuant to an Act of Parliament, or otherwise, to be raised in the books at the Chancery Pay Office shall not exceed thirty-six words, exclusive, in the case of a separate account in a cause or matter, of the title of the cause or matter in which such separate account is raised: Provided that if a sufficient reason be assigned to the satisfaction of the Registrar for extending beyond thirty-six words the title of an account directed by an order to be raised, such title may be so extended; and the Registrar shall in such case add to the direction to raise such account

Revoked as from 1st March 1884 by the Supr Ct Funds Rules 1884 r 2 (W.N (1884) pt II. App. No 9 (1 March 1884)

1874

the words "notwithstanding Rule 94"; and provided that if a sufficient reason be assigned, to the satisfaction of the Chancery Paymaster, for so extending the title of an account requested to be raised, such title may be so extended; and the Chancery Paymaster shall in such case add the said words to the direction under the authority of which such account is to be raised: In such title four figures shall be reckoned as one word.

This Rule shall not apply to any account which has been directed to be raised by an order, dated before the 7th day of January, 1873; and any account directed to be raised by an order, dated since the 7th day of January, 1873, but before the commencement of these Rules, shall be deemed to have been properly entitled, notwithstanding the length of the title of such account may exceed thirty-six words.—(Original Rule 59 amended.)

Index of documents filed at the Report Office.

95. An index shall be made and kept in the Report Office of the Court of all documents by these Rules directed to be filed there.—(Original Rule 60 amended.)

CAIRNS, C.

We certify that these Rules are made with the concurrence of the Commissioners of Her Majesty's Treasury.

STAFFORD H. NORTHCOTE.
ROW. WINN.

CHANCERY FUNDS (AMENDED) ORDERS, 1874. 1874

ORDERS OF COURT,

UNDER THE

COURT OF CHANCERY (FUNDS) ACT, 1872,
35 & 36 Vict. c. 44,

AND THE TRUSTEE RELIEF ACT, 1847,
10 & 11 Vict. c. 96.

The 22nd day of December, 1874.

I, The Right Honourable Hugh MacCalmont Baron Cairns, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable Sir George Jessel, Master of the Rolls, the Right Honourable the Lord Justice Sir William Milbourne James, the Right Honourable the Lord Justice Sir George Mellish, the Honourable the Vice-Chancellor Sir Richard Malins, the Honourable the Vice-Chancellor Sir James Bacon, and the Honourable the Vice-Chancellor Sir Charles Hall, do hereby, in pursuance of the powers contained in the Court of Chancery (Funds) Act, 1872, and of the Act of the 10 & 11 Vict. c. 96, entitled "An Act for the better securing trust funds, and for the relief of Trustees," and of all other powers and authorities enabling me in that behalf, order and direct in manner following:—

1. The Chancery Funds Orders, 1872 (1), are hereby revoked, and these amended Orders are substituted in lieu thereof, and shall come into operation on the 11th day of January, 1875, and may be cited as the "Chancery Funds Amended Orders, 1874." Revocation of Chancery Funds Orders, 1872, and commencement of these Orders.

(1) See Law Rep. 7 Ch. lv.

revoked as from March 1874 so far as may be necessary to give effect to C. of Funds Rules 1874, but to continue to apply to Orders made under the same as far as necessary to give effect to the Sept. C. of Funds Rules 1874 & 2 (11th March 1874) & 19. Sept. 1874 (March 1874)

Partly revoked see Sup. Ct. Funds Rules 1884 r. 2 (1884) VIII. Aff. No. 9 (1 Jan. 1884)

1874

Interpretation of terms.

2. "In these Orders, and in orders as herein defined, terms shall have the same meaning as the same terms are defined to have in the Court of Chancery (Funds) Act, 1872, and as prescribed by the Chancery Funds Consolidated Rules, 1874, and the term "Court" shall mean the Court of Chancery, and include a Judge thereof, whether sitting in Court or at Chambers; and the term "order" shall include a decree; and the term "cause or matter" shall, in these Orders, include a separate account in a cause or matter, and a matter intituled merely as an account; and words importing the singular number shall include the plural number, and words importing the plural number shall include the singular number; and words importing males shall include females.—(Original Order 2.)

Abrogation of certain Orders in Chancery.

3. The following Rules of the Consolidated Orders of the Court and General Orders of the Court are hereby abrogated; viz., the 1st to the 16th Rules, both inclusive, of the 1st of the said Consolidated Orders; the 5th Rule of the 5th of the said Consolidated Orders; the 3rd to the 9th Rules, both inclusive, of the 23rd of the said Consolidated Orders; the 1st to the 9th Rules, both inclusive, of the 41st of the said Consolidated Orders; the General Orders of 10th January, 1870, as to legacy and succession duty; and the General Orders of 25th February, 1868, 17th January, 1870, 1st May, 1871, and 28th August, 1828.—(Original Order 3 amended.)

Notice of payment, transfer, or deposit on request.

4. A person who shall make a transfer or payment of money or securities into Court, or a deposit of securities in Court, as provided by Rule 27 of the Chancery Funds Consolidated Rules, 1874, shall forthwith give notice thereof to the solicitors of the persons upon whose application the order directing such transfer, payment, or deposit was made, or to such persons if they have no solicitor: or if the order was made on the application of the person making such transfer or payment, to the solicitors of the other parties appearing on the application.

A person making a transfer, payment, or deposit upon request to the credit of a cause or matter, as provided by Rule 25 of the said Rules, shall forthwith give notice thereof to the solicitors on

1874

the record for the parties to the cause, or in case of a matter, to the persons interested, if known, or to their solicitors, if any, stating in such notice what the money or securities comprised in such transfer, payment, or deposit represent, and for what purpose such transfer, payment, or deposit has been made; and such notices may be sent by post.—(Original Order 4 amended.)

Notice of payment or transfer under Trustee Relief Act (10 & 11 Vict. c. 96) to be given.

5. A person having made a payment or transfer of money or securities into, or a deposit of securities in Court under the above-mentioned Act of the 10 & 11 Vict. c. 96, shall forthwith give notice thereof to the several persons named in his affidavit to be made in pursuance of Rule 34 of the Chancery Funds Consolidated Rules, 1874, and the said Act, as interested in or entitled to such money or securities.—(Consolidated Order 41, Rule 4.)

Application by petition or summons.

6. The persons interested in or entitled to any money or securities so paid or transferred into, or deposited in Court, in pursuance of the said Act of the 10 & 11 Vict. c. 96, and named in the affidavit, or any of such persons, or the person so paying or transferring into or depositing in Court, may apply by petition, or in cases where the fund does not exceed £300 cash or £300 in securities, by summons, as occasion may require, respecting the investment, payment out, or distribution of the money or securities, or of the dividends or interest of such securities.—(Consolidated Order 41, Rule 5.)

A person bringing funds into Court to be served with notice.

7. A person who has paid or transferred money or securities into, or deposited securities in Court pursuant to the said Act of 10 & 11 Vict. c. 96, shall be served with notice of any application made to the Court, or a Judge in Chambers, respecting such money or securities, or the dividends thereof, by any person interested therein or entitled thereto.—(Consolidated Order 41, Rule 6.)

Persons interested to be served with notice.

8. The persons interested in or entitled to such money or securities shall be served with notice of any application made by the trustee to the Court, or Judge, respecting such money or securities, or the dividends thereof.—(Consolidated Order 41, Rule 7.)

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Place of service to be named.

9. No petition relating to such money or securities as mentioned in the last four preceding Orders shall be set down to be heard, and no summons relating thereto shall be sealed until the petitioner or applicant has first named in his petition or summons a place where he may be served with any petition or summons, or notice of any proceeding or order relating to such money or securities, or the dividends thereof.—(Consolidated Order 41, Rule 8.)

Petitions and summonses to be entitled in the matter of the 10 & 11 Vict. c. 96.

10. Petitions presented and summonses issued under the said Act of 10 & 11 Vict. c. 96, shall be entitled in the matter of the said Act, and in the matter of the particular trust.—(Consolidated Order 41, Rule 9.)

Petitions to state whether duty is paid or not.

11. Every petition for dealing with money or securities in Court, chargeable with duty payable to the revenue under the Acts relating to legacy or succession duty, or the dividends on such securities, shall contain a statement whether such duty or any part thereof has or has not been paid.

Restriction on issuing certificates during vacations.

12. The Registrars of the Court shall not, without a special direction of a Judge, be required to issue certificates for the sale, transfer, or delivery of securities in Court during any vacation in their office.—(Original Order 5.)

Application at Chambers.

13. Applications under the Court of Chancery (Funds) Act, 1872, for the conversion into cash of Government securities in Court of any of the three descriptions mentioned in Rule 44 of the Chancery Funds Consolidated Rules, 1874, and for placing such cash on deposit, as provided by Rule 71 of the said Rules, or for dealing with interest on money on deposit, may be made to the Master of the Rolls and the Vice-Chancellors respectively, while sitting at Chambers.—(Original Order 6 amended.)

Petitions respecting money or securities on list of undealt with funds.

14. When a cause or matter has been inserted in the list mentioned in Rule 91 of the Chancery Funds Consolidated Rules, 1874, the fact shall be stated in every petition or summons affecting any money or securities to the credit of such cause or matter. In cases in which the money or securities affected by

such petition shall together amount to or exceed in value £500, a copy of such petition, and notice of all proceedings in Court or at Chambers shall (unless the Court otherwise directs) be served on the official solicitor of the Court, who shall be at liberty to appear and attend thereon.—(Original Order 7 amended.) 1874

15. Applications under the Copyhold Acts respecting any securities or money in Court, shall be made by summons at the Chambers either of the Master of the Rolls or of one of the Vice-Chancellors; but notice of any such application is not to be given to the Copyhold Commissioners, except when the Judge may so direct; and this Order shall be deemed an additional article to the 35th of the Consolidated Orders, Rule 1.—(Original Order 8.) Applications under Copyhold Acts to be made at Chambers.

16. The Clerks of Records and Writs shall not receive into their custody effects of the suitors consisting of jewels or plate, or other articles of a like nature, or negotiable securities.—(Original Order 9.) Certain articles and securities not to be received by Clerks of Records and Writs.

17. No order in a cause shall be passed or entered, and no certificate in a cause of a Chief Clerk, or of a Taxing Master of the Court, shall be signed or filed, and no petition in a cause shall be answered, and no summons in a cause shall be issued, and no affidavit made in a cause shall be filed, until the same respectively be either marked with the reference to the record, as prescribed by the 1st of the Consolidated Orders, Rule 48, or be inscribed with a note indicating that the cause was commenced prior to 2nd November, 1852, and the correctness of such reference may be required to be authenticated by the official seal of the Clerks of Records and Writs being impressed on every such document.—(Original Order 10.) Proceedings and documents in a cause to be marked with reference to record.

18. The duplicate orders or records to be deposited with the Clerks of Entries pursuant to Rule 18 of the Chancery Funds Consolidated Rules, 1874, shall annually (or oftener if the Senior Registrar shall direct) be bound up in volumes of convenient size, and indexed, and transmitted to the Report Office, in the same manner as written orders are now bound up, indexed, and Original orders to be deposited with Clerks of Entries.

Orders revoked Suit & Funds Rules 1884 r 2 (14 Aug 1884)
Pt. 2 Off. Ord. 9 (11 March 1884))

1874 transmitted and written office copies or extracts may be made therefrom, subject to the existing regulations relating thereto.

Solicitors' fees. 19. Solicitors shall be entitled to charge and shall be allowed the same fees on proceedings under these Orders, and under the Chancery Funds Consolidated Rules, 1874, as they are by the General Orders and practice of the Court entitled to charge and to be allowed in respect to proceedings of a similar or analogous description; and shall be entitled to charge and shall be allowed the same fees for printed copies of orders as they are now entitled to charge and to be allowed for written copies thereof.—(Original Order 11 amended.)

CAIRNS, C.
G. JESSEL, M.R.
W. M. JAMES, L.J.
GEORGE MELLISH, L.J.
RICHD. MALINS, V.C.
JAMES BACON, V.C.
CHARLES HALL, V.C.

CHANCERY FUNDS AMENDED LUNACY ORDERS, 1874.

1874

GENERAL ORDERS IN LUNACY,

UNDER THE COURT OF CHANCERY (FUNDS) ACT, 1872, THE LUNACY REGULATION ACT, 1853, AND THE LUNACY REGULATION ACT, 1862.

The 22nd day of December, 1874.

I, The Right Honourable Hugh MacCalmont Baron Cairns, Lord High Chancellor of Great Britain, intrusted by virtue of Her Majesty the Queen's Sign Manual with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind, do, with the advice and assistance of the Right Honourable the Lord Justice Sir William Milbourne James, and the Right Honourable the Lord Justice Sir George Mellish, the Lords Justices of the Court of Appeal in Chancery, being also intrusted as aforesaid, and by virtue and in exercise of the powers or authorities in this behalf vested in me by the Lunacy Regulation Acts, 1853 and 1862, and the Court of Chancery (Funds) Act, 1872, and of every other power or authority in anywise enabling me in this behalf, order as follows:—

Commencement of Orders.

1. The Chancery Funds Lunacy Orders, 1872 (1), are hereby revoked and rescinded, and these Orders are substituted in lieu thereof, and shall come into operation on the 11th day of January, 1875, and may be cited as the "Chancery Funds Amended Lunacy Orders, 1874."—(Substituted for original Order 1.)

Interpretation of terms.

2. Terms, words, and expressions in these Orders shall be read and construed according to the interpretation thereof contained

(1) See Law Rep. 7 Ch. lviii.

Discharged as from 1st Feb 1883 Ord = Lunacy Fees

1874

in the 2nd section of the Lunacy Regulation Act, 1853, and the Court of Chancery (Funds) Act, 1872, and the 3rd provision of the General Orders in Lunacy of the 7th November, 1853; and the word "Court" shall mean the Court of Chancery; and the word "order" shall include a report of a Master in Lunacy confirmed by fiat.—(Original Order 2.)

Abrogation of certain Orders in Lunacy.

3. The 29th, 49th, 50th, and 51st of the General Orders in Lunacy of 7th November, 1853, are hereby abrogated.—(Original Order 3 amended.)

Construction of existing Orders.

4. An order or certificate of the Masters containing directions for payment into or deposit in the Bank of England, with the privity of the Accountant General of the Court of Chancery, to the credit of the matter of a lunatic, of money, securities, or other effects, or for the transfer into the name and with the privity of the Accountant General in trust in the matter of a lunatic of stock or securities, and specifying the account, if any, to which the money, stock, securities, or other effects is or are to be placed, and which directions shall not at the coming into operation of these Orders have been acted upon, shall be read and construed as if they directed such money, stock, securities, and other effects respectively to be paid and transferred into, and deposited in Court, to the credit of the matter of such lunatic and account, if any, respectively.—(Original Order 4.)

Mode of framing orders and certificates.

5. After the coming into operation of these Orders, every order and every certificate of the Masters for the purpose of a payment or transfer into, or deposit in Court of money, stock, securities, or other effects, shall direct such payment or transfer to be made into, and deposit to be made in Court, to the credit of the matter of the lunatic, to the account, if any, to which it is intended that such money, stock, securities, or other effects should be placed.—(Original Order 5 amended.)

Declarations of trust not required in future.

6. No declaration of trust with respect to stock or securities transferred into Court to the credit of the matter of a lunatic shall be required to be made.—(Original Order 6 amended.)

Cairns, C.
W. M. James, L.J.
George Mellish, L.J.

ORDER OF COURT

1874

AS TO FEES ON PRINTED COPIES OF ORDERS,

UNDER THE

COURTS OF JUSTICE (SALARIES AND FUNDS) ACT, 1869,

32 & 33 Vict. c. 91.

The 22nd day of December, 1874.

Fees on printed copies of Orders.

I, The Right Honourable Hugh MacCalmont Baron Cairns, Lord High Chancellor of Great Britain, by and with the advice and consent of the Right Honourable Sir George Jessel, Master of the Rolls, the Right Honourable the Lord Justice Sir William Milbourne James, the Right Honourable the Lord Justice Sir George Mellish, the Honourable the Vice-Chancellor Sir Richard Malins, the Honourable the Vice-Chancellor Sir James Bacon, and the Honourable the Vice-Chancellor Sir Charles Hall, and with the concurrence of the Commissioners of Her Majesty's Treasury, do hereby, in pursuance of the powers contained in "The Courts of Justice (Salaries and Funds) Act, 1869" (32 & 33 Vict. c. 91), and of every other power enabling me in that behalf, order and direct that the fees to be paid, in the Report Office of the Court of Chancery, for printed copies of Orders to be acted upon by the Chancery Paymaster, and for printed office or certified copies thereof, shall be as set forth in the Schedule hereto; but no fee shall be chargeable in respect of any office copy of an order, or of a report or certificate of a Master in Lunacy, or of a certificate of a Chief Clerk or Taxing Master, or of any affidavit or statutory declaration, which shall be

See Mem Ord 28 Oct 1875 Schedule
H VI 75 010

1874 transmitted from any of the offices of the Court to the Chancery Audit Office, as provided by the said Chancery Funds Consolidated Rules, 1874.

SCHEDULE OF FEES.

	£	s.	d.
1. For every printed office copy of an order, per folio	0	0	4
2. For every printed copy of an order certified under the Statute 14 & 15 Vict. c. 99, s. 14, per folio of 90 words	0	0	4
3. For every printed copy of an order, not being an office or certified copy, per folio	0	0	1

Cairns, C.
G. Jessel, M.R.
W. M. James, L.J.
George Mellish, L.J.
Richd. Malins, V.C.
James Bacon, V.C.
Charles Hall, V.C.

We certify that this Order is made with the concurrence of the Commissioners of Her Majesty's Treasury.

Stafford H. Northcote.
Row. Winn.

NOTE AS TO THE REFERENCE TO RECORD NOW PRINTED WITH THE TITLE OF EACH CAUSE.

The Reference to Record, which is noted on the bill, gives the year of filing, the initial letter of the surname of first Plaintiff, and the consecutive number of the bills of that year and letter, and leads to the file of pleadings in the Record and Writ Clerk's Office.

The year, letter, and number, also lead to the entry of the cause in the Cause Books. The Cause Books commence in the year 1842. As to causes commenced before the 2nd of November, 1852, they contain the dates of pleadings and formal proceedings. As to subsequent causes they contain, in addition to these particulars, the dates of all decrees, orders, reports, and certificates made since the 30th of November, 1855. In these books there is entered against every decree or order a reference to the volume and folio of the Registrar's Books for the year, where the decree or order will be found *in extenso*.

No reference is written against reports or certificates, but the dates, extracted from the Cause Book, lead to the corresponding entries in the Volumes of Reports and Certificates, and the Index thereto.

The Cause Books are kept in the Record and Writ Clerk's Office.

The Registrar's Books and the Index thereto, and the Reports and Certificates and the Index thereto called the Calendar of Reports, are kept in the Report Office, a branch of the Record and Writ Clerk's Office under the same roof.

For the time of commencement of year in the "Registrar's Books," see 1 Seton, pp. 2, 3.

When the Reference to Record is not known, it may be found by searching for the necessary period the Index to Cause Books kept in the Record and Writ Clerk's Office.

In searching for decrees, orders, reports, and certificates made in causes commenced before the 2nd of November, 1852, or made in subsequent causes before the 30th of November, 1855, or made in matters, the old method must still be followed, viz.:

If a decree or order is required, search in the Report Office the Index to the Registrar's Books; if a report or certificate, search in the same office the Calendar of Reports. The Index to the Registrar's Books gives the reference to the Registrar's Books, and the Calendar of Reports the reference to the Volumes of Reports and Certificates.

Affidavits are filed in the Record and Writ Clerk's Office, where the Index thereto may be searched.

Petitions are filed in the Report Office, where the Index thereto may be searched.

Chancery Appeal Cases

(Including Bankruptcy and Lunacy Cases)

BEFORE

THE LORD CHANCELLOR

AND THE

COURT OF APPEAL IN CHANCERY.

In re BANK OF HINDUSTAN, CHINA, AND JAPAN.

L. C. and L. JJ.

1873

Nov. 5, 6, 18.

CAMPBELL'S CASE.

HIPPISLEY'S CASE.

ALISON'S CASE.

*Companies—Shareholders—Dissentients—Confirmation—Estoppel—New Shares —Two Meetings—*25 & 26 *Vict. c.* 89, *ss.* 12, 50, 51—*Judgment at Law.*

By an agreement between two companies, one company was to buy the business of the other company, the consideration to be paid in shares of the buying company, to be issued to the selling company and divided amongst its shareholders. Resolutions approving of this agreement and also authorizing the creation of the requisite new shares (all the shares authorized by the articles of association having been already issued) were passed at one extraordinary general meeting of the buying company, and were confirmed at a second meeting. A large majority of the shareholders of the selling company assented to the agreement, and applied for and received what purported to be new shares of the buying company. Certain dissentient shareholders, however, filed a bill in Chancery and obtained a decision from *Giffard*, V.C., that the agreement was void. These shareholders were afterwards, by way of compromise, paid a sum of money by the official liquidator of the buying company, then in liquidation, and the suit in Chancery was stayed. Certain former shareholders of the selling company, holders of what purported to be new shares in the buying company, then applied to be repaid the money

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which they had paid to the buying company for premium and on calls upon their shares:—

Held, that as the buying company did really acquire (by a title which, though originally defective as against the dissentient shareholders, had been in the end confirmed) the property of the selling company, and as the shares were issued *bonâ fide*, the holders of the new shares could not now repudiate them:

Held, that the directors of a company, after a resolution to increase the capital of a company by the issue of new shares has been approved of by two meetings, according to sects. 50 and 51 of the *Companies Act*, 1862, can proceed to issue the shares; and that it is not necessary, under sect. 12, to have the articles varied at two meetings and the issue of the shares authorized by two other meetings.

Order of *Wickens*, V.C., discharged.

The buying company had brought against one of the holders of new shares an action to recover calls, in which action judgment had been given for the Defendant:—

Held, that the judgment was conclusive; and that this holder of shares must be repaid what he had paid for premium and calls on the shares.

Order of *James*, L.J., affirmed.

Bank of Hindustan v. *Alison* (1) discussed.

THE *Imperial Bank of China, India, and Japan, Limited*, was a company registered in April, 1864, with a nominal capital of £2,000,000, in 40,000 shares of £50 each, of which 20,000 only were issued. The 62nd clause of the articles of association gave the directors power, amongst other things, to amalgamate with any company carrying on business within any of the objects of the company as stated in the memorandum of association, or with any bank or financial or exchange business, and to pay for any property or rights acquired by the company in money or shares, or partly in one mode and partly in the other, and to sell, exchange, or otherwise dispose of, absolutely or conditionally, or for any limited interest, any of the property or contracts of the company, upon such terms as they might think fit, and accept payment of any money due to the company in shares or otherwise.

The *Bank of Hindustan, China, and Japan, Limited*, was a company registered in 1862, carrying on business with objects similar to those of the *Imperial Bank*. The nominal capital was £1,000,000 in 10,000 £100 shares, which might be increased to an amount not exceeding £2,000,000 by the creation of 10,000

(1) Law Rep. 6 C. P. 222.

additional £100 shares. This increase had been made in January, 1864, and the whole of those shares had been issued. The articles of association of the *Bank of Hindustan* further provided that—

"Article 101. In their management of the business of the company, the directors, without any further power or authority from the shareholders, may do the following things—that is to say, (12.) They may, upon such terms as they think fit, amalgamate with or purchase or acquire the business and property of any company, partnership, or persons carrying on any business included amongst the objects of this company as specified in the memorandum of association, and may pay for the same either in cash or in shares, to be treated as either wholly or in part paid up, or partly in cash and partly in such shares, or in such other manner as the board may from time to time deem expedient."

A large sum was paid up by the shareholders of the *Imperial Bank*, but no business was ever carried on, and towards the end of June, 1864, negotiations were commenced for an amalgamation with the *Bank of Hindustan*. On the 10th of August, 1864, the directors of the *Imperial Bank* sent notice to their shareholders that an extraordinary general meeting would be held on the 25th of August, when an agreement for amalgamation with the *Bank of Hindustan* would be submitted for approval.

That agreement bore date the 24th of August, 1864, and purported to be made between the two companies; amongst the terms were, that 20,000 new shares, of £100 each, of the *Bank of Hindustan*, should be issued; that the *Imperial Bank* should be wound up voluntarily, and that liquidators should be appointed who should be authorized to sell the business and property of the *Imperial Bank* to the *Bank of Hindustan*, and to receive, in compensation for such sale, 20,000 shares in the *Bank of Hindustan*; that these shares were to be distributed amongst the shareholders of the *Imperial Bank* at a premium of £6, one share in the *Bank of Hindustan* being given for one share in the *Imperial Bank*.

The meeting of the *Imperial Bank* was held on the 25th of August, when resolutions were passed approving of the agreement, for winding up the company, and for the purchase of the shares of

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dissentient members. These resolutions were confirmed at another extraordinary meeting of the *Imperial Bank* held on the 12th of September.

An extraordinary meeting of the shareholders in the *Bank of Hindustan* was convened for the 25th of August by a notice stating that the business to be transacted would be—

"1. To consider terms of arrangement with the *Imperial Bank of China*, and, if approved, to affix the seal of the company thereto, and authorize the directors to carry the same into effect.

"2. To elect four of the directors of the *Imperial Bank of China* as directors of this company.

"3. To ratify and confirm a resolution of the board increasing the capital of the company by the creation of 20,000 new shares of £100 each, at £6 per share premium, to be issued to the persons and upon the terms stated in the above-mentioned agreement with the *Imperial Bank of China*."

The meeting was, pursuant to the notice, held on the 25th of August, 1864, at which meeting the following resolutions were passed:—

"1. Resolved, that the agreement dated the 24th day of August, 1864, between this company of the first part, and the *Imperial Bank of China* of the other part, be approved, and the directors be authorized to affix the seal of the company to the same, and do all things necessary to carry it into effect.

"2. Resolved, that the capital of the company be increased by the creation of 20,000 new shares of £100 each, to be issued at £6 per share premium to the persons and upon the terms stated in the before-mentioned agreement, and that the resolution of the board to the above effect be ratified and confirmed.

"3. Resolved, that the directors be authorized to add four directors to their present board, to be selected by them from the existing board of the *Imperial Bank of China and Japan*."

Notice was then sent to all the shareholders that an extraordinary general meeting of the company would be held on the 12th of September, at which the business to be transacted would be to confirm the resolutions passed by the company at the meeting of the 25th of August, stating them at length.

The second extraordinary meeting was accordingly held, and at such meeting the following resolution was passed:—

"Resolved, that this meeting do confirm certain resolutions passed by the company in extraordinary general meeting on the 25th of August, 1864, of which the following are copies" (setting them out).

A notice of these special resolutions was on the 14th of September, 1864, registered with the Registrar of Joint Stock Companies.

The secretary of the *Bank of Hindustan*, about the 15th of September, 1864, sent round to the shareholders in the *Imperial Bank* a circular, informing them that they were, under the arrangement above mentioned, entitled to shares in the *Bank of Hindustan*, and stating the terms.

Most of the shareholders in the *Imperial Bank*, including *Alison*, *Campbell*, and *Hippisley*, signed the forms of application for shares in the *Bank of Hindustan*, and shares in the *Bank of Hindustan* were allotted to them accordingly.

The liquidators of the *Imperial Bank* assigned the assets of that bank to the *Bank of Hindustan* in pursuance of the agreement, and the *Bank of Hindustan* proceeded to carry on the joint business.

In May, 1866, certain dissentient shareholders in the *Imperial Bank* filed a bill against the *Bank of Hindustan*, praying that the agreement between the two companies might be declared void and inoperative. The Vice-Chancellor *Giffard*, on the 7th of May, 1868, delivered judgment to the effect that the transaction was not such an amalgamation as the directors of the *Imperial Bank* were empowered by the articles of association to make, nor a valid transaction under the 161st section of the *Companies Act*, 1862; and he declared that the transaction was to be set aside; as reported (1).

The *Bank of Hindustan* stopped payment in November, 1866, and passed into voluntary liquidation, and an order for continuing the winding-up under supervision was made on the 21st of December, 1866. No decree or order was passed or entered upon the judgment of the Vice-Chancellor *Giffard;* and proceedings in the above-mentioned suit were, on the 12th of June, 1868, stayed

(1) Law Rep. 6 Eq. 91.

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by order, under a compromise made with the sanction of the Court in the winding-up. The terms were that the dissentient shareholders in the *Imperial Bank* received from the liquidators of the *Bank of Hindustan* £4500, which was stated to be less than the value of their shares.

Questions were afterwards raised whether certain shareholders in the *Imperial Bank* who had received shares in the *Bank of Hindustan* were really shareholders in that bank; and the questions were brought before the Court for decision in the following cases.

It was shewn that annual reports had been issued by the *Bank of Hindustan*, in which the dealings between the two companies were fully stated, and from which it appeared that the assenting shareholders in the *Imperial Bank* had received shares in the *Bank of Hindustan*.

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ARTHUR ALISON held twenty-five shares in the *Imperial Bank*, on each of which he had paid £5; and on the 22nd of September, 1864, he applied for twenty-five shares in the *Bank of Hindustan* in exchange for his other shares, and they were allotted to him. He was credited with £5 paid on them, and on the 5th of January, 1865, he paid a further sum of £5 per share on account of deposit, and £1 per share on account of the premium of £6. In 1865 three further calls of £5 each were made, but were not paid by him, and on the 12th of March, 1866, his shares were duly forfeited for non-payment of calls. An action was in 1869 brought by the *Bank of Hindustan* against *Arthur Alison* for the amount so remaining unpaid, and came on to be heard before the Chief Justice *Bovill* and a special jury, when a verdict was found for the Plaintiffs subject to the opinion of the Court on a special case.

In the special case most of the facts were fully stated, but the compromise in equity was not mentioned, and the statement therein as to the judgment of the Vice-Chancellor *Giffard* was as follows:—

"The bill came on for hearing before the Vice-Chancellor

Giffard on the 6th and 7th days of May, 1868, and a decree was made by the Vice-Chancellor setting aside the amalgamation as *ultrà vires* and inoperative. The proceedings, evidence, and judgment in the aforesaid suit, as reported in the 6th volume of the authorized Law Reports, Equity Series, pages 91 to 101, are, for the purposes of this case, to be taken as correct and true in every particular as if the same had been included verbatim in this case."

The question on the case was argued on the 17th of November, 1870, when the Court of Common Pleas held that, the supposed amalgamation having been declared void, the directors of the *Bank of Hindustan* had no power to issue the new shares, and that the Defendant was not estopped from denying that he was a shareholder; and the Court gave judgment for the Defendant, as reported (1). This decision was affirmed by the Court of Exchequer Chamber, as reported (2).

Alison then applied in the winding-up for repayment of the money paid by him for shares, premium, and calls, with interest, and the Lord Justice *James*, sitting for the Vice-Chancellor *Wickens*, considered the judgment at law to be conclusive, and on the 28th of February, 1873, made an order for repayment accordingly, as reported (3).

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WILLIAM CAMPBELL held five shares in the *Imperial Bank*, upon which he had paid £5 per share. He had received the circulars which were addressed to the shareholders in reference to the amalgamation, but said that he had no knowledge of the matters referred to therein. He attended no meeting of the shareholders, either personally or by proxy. He applied to the *Bank of Hindustan* for five shares in exchange for his five *Imperial Bank* shares, and they were on the 21st of September, 1864, allotted to him. He afterwards received the certificates. He paid the £6 per

(1) Law Rep. 6 C. P. 54. (2) Law Rep. 6 C. P. 222.
(3) Law Rep. 15 Eq. 394.

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share premium and the deposit, and he paid the several calls. By an order made on the 21st of December, 1866, he was placed on the list of contributories. In January, 1871, he was served with a balance order for £50 and £2 8*s.* 8*d.* interest, and those sums were paid by him under protest.

On the 24th of February, 1871, he applied, asking that the list of contributories might be amended by striking out his name, and that he should be repaid all the sums which he had paid to the *Bank of Hindustan*, with interest at £5 per cent.

R. T. Hippisley held five shares in the *Bank of Hindustan* under similar circumstances, and he had paid the calls made upon the shares on the faith that there had been a valid amalgamation. On the 13th of October, 1864, he had purchased twenty shares in the *Imperial Bank*, and on the day following he purchased twenty more at the same rate; but the transfers were of forty shares in the *Bank of Hindustan*, and he paid the calls which had been made upon them. He also took out a summons to have the list of contributories amended by striking out his name, and for repayment of what he had paid, with interest.

The Vice-Chancellor *Wickens* ordered repayment, with interest, to *Campbell* and *Hippisley*, as reported (1).

The liquidators appealed in all the cases.

Mr. *Greene*, Q.C., Mr. *Higgins*, Q.C. (Mr. *Graham Hastings* with them), in support of the appeals in *Campbell's Case* and *Hippisley's Case*:—

The judgment of the Court of Exchequer Chamber is not a decision for the purpose of these applications. Moreover, if that Court held that four meetings were necessary to sanction an increase of capital, we submit that that cannot be so. Everything required by sect. 12 of the Act of 1862 has been done. Sect. 9 of the Act of 1867 is quite different. Ample notice was given to all the shareholders, and they all remained content until the bank stopped payment. As to setting aside the agreement between the companies, that is now impossible, as there cannot be a restitution

(1) Law Rep. 16 Eq. 417.

in integro: Clarke v. *Dickson* (1); *Western Bank of Scotland* v. *Addie* (2). Moreover, these applications are too late. The shareholders should have resisted payment of the calls, and have applied to have the order discharged. We say that the shares were validly issued; but whether they were or not, both the companies and the allottees are estopped from disputing the validity of the shares. There is no pretence for saying that these shareholders did not know everthing that was going on. Can a shareholder go on receiving profits if the bank is prosperous, and then turn round and repudiate if it fails? How many years may this state of things continue? There was no ignorance of facts, and money paid through ignorance of the law cannot be recovered: *Marriot* v. *Hampton* (3). There was no failure of consideration, and the *Bank of Hindustan* got all that they were to get. Shares have been held to be made valid by estoppel: *Croom's Case* (4); *Richmond's Case* (5).

Mr. *Benjamin*, Q.C., and Mr. *Marten*, for the executors of Mr. *Sassoon*, a shareholder in the *Bank of Hindustan* who had obtained leave to appear:—

It is conceded that if there were shares in the *Bank of Hindustan* which could be issued, then these shares are good. But it is now said that the shares could not be issued, and are not voidable, but absolutely void. That, however, is not so. There was nothing illegal in issuing more shares, and the issue might be, and in fact was, adopted by the company. The shares were regularly issued in execution of the powers given by the Act of 1862 to all companies. The Act prescribes a method of issuing, but the rules are only for the benefit of the shareholders, and to prevent their being imposed upon. There is no question of public policy, and if the shareholders choose they may waive all these precautions and issue shares as they please. The question was fully discussed in *Taylor* v. *Chichester and Midhurst Railway Company* (6). How can such applicants say that they are not shareholders when they have applied for shares, and some of them have voted and received

(1) E. B. & E. 148. 4 Jur. N.S. 893. (4) Law Rep. 16 Eq. 417, 420.
(2) Law Rep. 1 H. L. Sc. 145. (5) 4 K. & J. 305.
(3) 2 Sm. L. C. 6th Ed. 375. (6) Law Rep. 2 Ex. 356.

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profits? A share is merely the right to a portion of the property and profits of the company, and if a man takes his share of the profits he is a shareholder. The shares were actually issued by the company; *fieri non debet, factum valet. Campbell* and *Hippisley* were, in the annual reports, treated as shareholders, and full information was given to them both when the shares were to be issued and afterwards; but now they say that they can go back and deny that they were shareholders. A man must not lie by whilst all appears to go on well, and then repudiate his acts when evil days come: *Peel's Case* (1); *Oakes* v. *Turquand* (2); *Evans* v. *Smallcombe* (3). A company may be estopped as well as an individual: *East India Company* v. *Vincent* (4); *Grady's Case* (5); *Phosphate of Lime Company* v. *Green* (6). All the existing shareholders must be held to have assented, and the Courts of Law in *Alison's* case decided on an imperfect state of facts.

Mr. *Eddis*, Q.C., and Mr. *Jackson*, Q.C., for *Campbell*:—

These companies are the creatures of the Acts of Parliament, and can only proceed and be bound according to those Acts. One shareholder is not an agent whose acts can bind another; but the Act of 1862, in sect. 12, has provided a plan by which the other shareholders can be bound, and if the plan prescribed by the Act is not followed the other shareholders are not bound. The Act carefully prescribes that power must first be given to the directors, and then the shareholders are to consider whether that power is to be exercised. *Campbell* paid calls, thinking himself bound to do so; but that is no reason why he should not recover if he was in fact not bound to pay. These shares had no legal existence, and *Campbell* could not have enforced any claim against the company. He has taken no profits and received no dividends, and the share certificates are mere pieces of waste paper. The shares are not voidable and capable of being confirmed, but are absolutely void: *Smith's Case* (7). There is no difference between *Campbell's* case and *Alison's* case, and *Alison* has been solemnly decided not

(1) Law Rep. 2 Ch. 674.
(2) Ibid. 2 H. L. 325.
(3) Ibid. 3 H. L. 249.
(4) 2 Atk. 83.
(5) 1 D. J. & S. 488.
(6) Law Rep. 7 C. P. 48.
(7) Law Rep. 4 Ch. 611.

to be a shareholder. Such a transaction can be set aside at any time: *Brotherhood's Case* (1).

If authority is wanted, the case of *In re West India and Pacific Steamship Company* (2), shews that four meetings must be held in order to enable the capital to be increased by the issue of new shares.

Mr. *Dickinson*, Q.C., and Mr. *Rowcliffe*, for *Hippisley*:—

The real substance of the decision of the Court of Exchequer Chamber was, that to make the shares valid two things had to be done, but only one was actually done. That defect cannot be got over. The articles of association of the *Bank of Hindustan* did authorize alterations, but not in the way in which this was done, and the same as to sect. 12 of the Act. The creation of a power is one thing and the exercise of it is another thing. The knowledge by the shareholders of what was going to be done cannot cure the defect. Even if all the shareholders who were *sui juris* had indi-

(1) 4 D. F. & J. 566.

(2) V.-C. Giffard, 1868. April 25.

In re WEST INDIA AND PACIFIC STEAMSHIP COMPANY.

THIS was a Petition for the reduction of capital and shares.

By the 66th article of association it was stipulated that any extraordinary meeting of the shareholders, by a majority of two-thirds present in person, or by proxy, should have power from time to time to vary the amount and number of the present shares, or of any new or substituted shares, and for that purpose to consolidate or divide the present or any new or substituted shares in such manner as should be deemed expedient, and to do other acts incidental or necessary thereto. At an extraordinary general meeting of shareholders held on the 17th of February, 1868, it was unanimously resolved that the capital should be reduced from £1,250,000 to £625,000, and the shares from £50 each to £25 each. At another meeting held on the 9th of March, 1866, the same resolution was unanimously confirmed. No resolution had been passed to alter the company's regulations so as to authorize the company to modify the conditions contained in its memorandum of association in conformity with the 9th section of the *Companies Act*, 1867.

Mr. *Dryden*, for the Petitioners, submitted that the Court had jurisdiction to make the order.

The VICE-CHANCELLOR was clearly of opinion that he had not jurisdiction. There must be a special resolution altering the company's regulations according to the terms of the Act. Even if the resolutions were binding on the existing members, it would not, in His Honour's opinion, bind future shareholders.

Solicitors: Messrs. *Haigh, Herbert, & Co.*

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vidually assented, there would remain those who were not, and they form part of the company. In no other way can all the shareholders be bound: *In re Bahia and San Francisco Railway Company* (1). It does not follow that a man is a shareholder because he has claims against a company: he may be entitled to compensation from the company for pretending to issue shares which they could not issue, but that is a different thing from being a shareholder. *Hippisley* paid for what he did not get, and he is entitled to have his money back.

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This appeal was heard before the Lord Chancellor and the Lord Justice *Mellish* alone.

Mr. *Greene*, Q.C., and Mr. *Higgins*, Q.C. (Mr. *Graham Hastings* with them), for the liquidators:—

There are many cases in which a man, though not a shareholder at law, is so in equity. How is this case to be distinguished from *Kitchin* v. *Hawkins* (2)? *Alison* allowed himself to be held out to the world as a shareholder, and was on the register. The Court of common law certainly held that we could not compel him to be a shareholder, but never held that the consideration failed. We could have given him shares.

Mr. *Dickinson*, Q.C., and Mr. *Brooksbank*, for *Alison*, were not called upon.

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Nov. 18. LORD SELBORNE, L.C.:—

The Vice-Chancellor, proceeding mainly on the authority of a decision of the Court of Common Pleas, affirmed by the Exchequer Chamber, in *Alison's* case, and of an order of this Court in the same case, consequential upon that decision, has determined that these two gentlemen, Mr. *Campbell* and Mr. *Hippisley*, are now

(1) Law Rep. 3 Q. B. 584. (2) Law Rep. 2 C. P. 22.

entitled to repudiate the position of shareholders and contributories in the *Bank of Hindustan*, which they have *de facto* held from 1864 to the present year, and to have repaid to them out of the assets of that bank in the hands of the official liquidator all the sums paid by them for calls or otherwise before the winding-up order, and likewise further sums paid by them as contributories under a balance order made in 1869, since the winding-up, with interest thereon.

There are some distinctions between the two cases, but in the view which we take of them it is not necessary to consider the effect of those distinctions. The shares in question are some of a much larger number, which, in the autumn of 1864, were issued by the directors of the *Bank of Hindustan* to, and accepted by, a large number of persons who had been shareholders in another banking company called the *Imperial Bank of China, India, and Japan*. They were issued under the authority of a special resolution, passed and confirmed unanimously by extraordinary general meetings of the shareholders of the *Bank of Hindustan*, for the purpose of giving effect to the terms of payment, on which, according to an agreement confirmed by the same meetings, the directors of that bank had contracted to acquire and purchase the property and assets of the *Imperial Bank*.

The *Imperial Bank* was a company which had a subscribed capital, and had assets of considerable value (it has been stated to us as £70,000), and, as it is also stated, no indebtedness. It had gone into liquidation under resolutions for a voluntary winding-up passed at the same time that this agreement was made, and all its business, property, and assets had been handed over to, and remained in the possession of, the *Bank of Hindustan*, which continued to carry on business as a going concern for more than two years afterwards. The great majority of the shareholders in the *Imperial Bank*, including Mr. *Campbell*, Mr. *Hippisley*, and another gentleman, from whom, during the progress of the arrangement Mr. *Hippisley* purchased shares, assented to this agreement, and to everything that was done upon the footing of it. An inconsiderable minority, which was stated in the Chancery suit to which I am about to refer not to exceed forty-three persons, dissented from it; and two of them filed a bill in this Court in the name of

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the *Imperial Bank* (which they had obtained leave to use for that purpose), and also in their own names, praying, in effect, that certain resolutions which had been passed by the *Imperial Bank* for the purpose of giving force to this agreement as against all their shareholders under the *Companies Act*, 1862, s. 161, might be declared invalid, or that, at all events, the dissentient shareholders might be held not bound, and might be paid the full value of their shares out of the property and assets of the *Imperial Bank*. To this bill the *Bank of Hindustan* was, of course, a Defendant. It was brought to a hearing in May, 1868, and the Vice-Chancellor Sir *G. M. Giffard*, on grounds the correctness of which is not open to any dispute, then delivered judgment to the effect that no valid or binding amalgamation, by virtue of the *Imperial Bank's* articles of association, or of sect. 161 of the *Companies Act*, 1862, had taken place under the resolutions of the *Imperial Bank* impeached by the bill; and that such resolutions were not binding on the dissentient *Imperial Bank* shareholders; at the same time expressing his opinion that, consistently with this conclusion, and notwithstanding the right of those dissentient shareholders to receive out of the assets of the *Imperial Bank* the full value of their shares, all the other shareholders in that company who had assented to the agreement, and who had accepted shares in the *Bank of Hindustan* on the footing thereof, and their respective shares and interests in the assets of the *Imperial Bank*, would be and continue bound by that assent and by that acceptance of shares.

The dissentient shareholders, having thus obtained the Vice-Chancellor's opinion that they were entitled to the relief which they sought for their own personal benefit, were satisfied with that advantage, and proceeded no further with their suit. No decree in it was ever drawn up, passed, or entered, and no attempt was made to recover from the *Bank of Hindustan* any part of the property and assets of the *Imperial Bank*, of which they had obtained and retained possession under the agreement. On the contrary, the Vice-Chancellor's judgment having been pronounced in May, 1868, and the *Bank of Hindustan* having itself already passed into liquidation in December, 1866, a compromise was effected under an order made in Chambers by the Judge to whose super-

vision the winding-up of the *Bank of Hindustan* was subject, and a subsequent order in the suit itself, by which all further proceedings in that suit were finally stayed, and the title of the *Bank of Hindustan*, as purchasers of the property and business of the *Imperial Bank*, was, in effect, confirmed by all the dissentient shareholders in that company upon the terms of the payment to them by the *Bank of Hindustan* of £4500, which seems by the evidence to have been less than the value of their shares.

At the time when this arrangement was made, Mr. *Campbell* and Mr. *Hippisley* had been settled and remained on the list of contributories of the *Bank of Hindustan*, and one or both of them had taken part in the appointment of its liquidators. They had never down to that time made any attempt to disaffirm or avoid the contracts under which they took their shares, or to escape from the liabilities of their position of shareholders; and afterwards, in 1869, they paid without objection certain calls then made upon them under balance orders in the winding-up of that company. In this state of circumstances, if there had been no question as to the power of the *Bank of Hindustan* to create and issue the shares in question, it would seem obvious that these gentlemen could not have any possible claim to be removed from the list of contributories, or to have the money which they had paid returned to them. I think it, for my part, equally clear that they could have no such claim, even if there might originally, or at any subsequent period, have been some possible ground for disputing the validity of the creation and issue of those shares, unless it would have been open, under all the circumstances of this case, to the *Bank of Hindustan* itself, or to the official liquidators of that bank (supposing it to have been for their interest to do so), to exclude these gentlemen from the rights of shareholders. In other words, either if these shares were originally well created, or if the *Bank of Hindustan* was estopped from denying that they were so, these gentlemen, having entered voluntarily into contracts of which they had the full benefit, and which, if not always binding upon the company, had become so before any act had been done on either side to rescind or avoid them, would have now no pretence whatever to be relieved therefrom. If authority had been needed for these propositions it would, I think, be sufficient to refer to the decisions

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of this Court in *Hare's Case* (1) and *Challis' Case* (2), in both of which shares in one company were taken by shareholders of another upon the footing of an amalgamation, the legal validity of which was not less disputed and disputable than that in the present case.

I am further of opinion that, upon the facts above stated, a decision against Mr. *Campbell* and Mr. *Hippisley* upon the present appeals is not inconsistent with the decision of the Court of Common Pleas in *Alison's* case. The directors of the *Bank of Hindustan* had, by their articles of association (101, sub-sect. 12), power, upon such terms as they might think fit, to purchase or acquire the business and property of any company, partnership, or persons carrying on any similar business, and to pay for it in shares in such manner as the board might deem expedient. At the date of the agreement with the *Imperial Bank*, the *Bank of Hindustan* had issued all the shares which it had down to that time power to create; but under sects. 12 and 50 of the *Companies Act*, 1862, it was enabled to increase its capital, provided a special resolution for that purpose was duly passed and confirmed by proper majorities at two extraordinary general meetings of the shareholders.

Two extraordinary general meetings specially convened for that purpose did, on the 25th of August, 1864, unanimously pass, and on the 12th of September following unanimously confirm, a series of special resolutions, one of which was in the following words:—"That the capital of the company be increased by the creation of 20,000 new shares of £100 each, to be issued at £6 per share premium, to the persons and upon the terms stated in the before-mentioned agreement;" (*i. e.* in the agreement with the *Imperial Bank*, which was approved by another of the same resolutions); "and that the resolution of the board to the above effect be ratified and confirmed."

The Court of Common Pleas does not seem to have doubted that if the agreement with the *Imperial Bank* had been carried into effect so as to vest in the *Bank of Hindustan*, as purchasers, the property and business of the *Imperial Bank*, these shares (which were, in fact, issued by the directors at 6 per cent. premium to the persons and upon the terms stated in that agreement) would have

(1) Law Rep. 4 Ch. 503. (2) Law Rep. 6 Ch. 266.

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been well created. But that Court had to pronounce its decision upon a special case (the action being brought by the company to recover an arrear of premium and calls against one of those shareholders whose shares had been forfeited as early as March, 1866), and upon such inferences as it might properly draw from the facts therein stated. In that special case it was stated as a fact (though contrary to the actual truth) that on the hearing of the Chancery suit in May, 1868, "a decree was made by Vice-Chancellor *Giffard*, setting aside the amalgamation as *ultrà vires* and inoperative," and no mention at all was made of the subsequent compromise of that suit, or of the arrangement by which the opposition of the dissentient *Imperial Bank* shareholders was bought off, and the title of the *Bank of Hindustan*, as purchasers, to the business and property of the *Imperial Bank* was confirmed and made absolute.

Upon this statement, partly incorrect and partly imperfect in these important particulars, the Court of Common Pleas held, that the power given to the directors of the *Bank of Hindustan*, by the resolutions of August and September, 1864, to issue the shares in question was for a special purpose, which had wholly failed, and upon special conditions, which had not been fulfilled; and therefore that those shares had not been validly issued.

"The decision," said Lord Chief Justice *Bovill* (1), "of Vice-Chancellor *Giffard* is, that the Plaintiffs have not purchased the business of the *Imperial Bank*." He further said (2), "The proposed arrangement for acquiring the business of the *Imperial Bank* would, if carried out, have authorized a further increase of capital by the issue of new shares. The attempt to do so having proved abortive, the shares so created cannot be treated as valid shares." And, on the question of estoppel, he said (3), "Looking, however, to all the circumstances, it is clear to my mind that all that was done, or omitted to be done, on either side, was the result of mere mistake." Mr. Justice *Willes* said (4), "The effect of the decision of Vice-Chancellor *Giffard* holding the amalgamation to be void, was to shew that £5 per share had not been paid on account of the Defendant." . . . . It is a mere fallacy to suppose that there was any purchase of the business, or any part of the business, of the *Imperial*

(1) Law Rep. 6 C. P. 64.
(2) Ibid. 69.
(3) Law Rep. 6 C. P. 71.
(4) Ibid. 73, 74.

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Bank of *China*. That removes the argument which was founded upon the 101st clause of the articles of association of the *Bank of Hindustan*, so far as the transaction rests on the purchase of the business of the *Imperial Bank* of *China*, notwithstanding the attempted amalgamation turned out to be unavailing." The opinions of the other Judges were in substance the same.

It appears, however, to us, upon the evidence as it now stands, that, as a matter of fact, the *Bank of Hindustan* did really and *bonâ fide* acquire and purchase (by a title which, though originally defective as against some of the shareholders in the *Imperial Bank*, was in the end confirmed so as to become unimpeachable), the business and property of the *Imperial Bank;* that the shares in question were *bonâ fide* issued for the purpose, and upon the terms, which were authorized by the resolutions of August and September, 1864; that the *Bank of Hindustan* could never have repudiated those shares; and that Mr. *Campbell* and Mr. *Hippisley*, and the other shareholders in the same position, have actually got all that they contracted to get. The purpose, therefore, for which the authority was given did not wholly fail, and the conditions on which the issue was authorized were fulfilled. Nor does it appear to us to be for the purpose of the present decision at all material, that the infirmity of the title of the *Bank of Hindustan*, as purchasers, to the business and property of the *Imperial Bank*, as against the dissentient shareholders of the latter company, was not effectually cured until after the winding-up of the *Bank of Hindustan*, and was then cured only for a valuable pecuniary consideration; the facts being, that there never was a time after the issue of those shares at which the *Bank of Hindustan* were not in the actual undisturbed possession of the fruits of their purchase; and that the terms of compromise with the dissentient shareholders of the *Imperial Bank*, when sanctioned by the authority of this Court in the winding-up, became binding on the *Bank of Hindustan* itself, and on all the contributories thereto, including, in our opinion, Mr. *Campbell* and Mr. *Hippisley*.

There remains, however, another objection to the validity of the creation and issue of these shares, which appears to have been, for the first time, urged in the Court of Exchequer Chamber, and to have been then adopted by the Lord Chief Baron, apparently

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without dissent on the part of any other member of that Court.

It was urged by counsel that, having already exhausted their powers of increasing their capital, the directors of the *Bank of Hindustan* could not lawfully create the additional shares they affected to create, without having first altered their articles of association in the manner directed by sects. 12, 50, and 51 of the *Companies Act*, 1862; and, to shew that they had not done this in a lawful manner, a case of *In re West India and Pacific Steamship Company* (1), was referred to, which has been now again relied on before us for the same purpose by Mr. *Jackson*. The Lord Chief Baron, after expressing his concurrence with the judgment of the Court of Common Pleas, on the grounds on which it had been rested by the Judges of that Court, proceeded thus (2):—"I do not refer to the ground upon which the agreement of amalgamation was declared to be void. It was set aside. I feel bound to observe, in addition to the ground taken by *Giffard*, V.C., that these 20,000 new shares were never lawfully created at all;" the reason given by His Lordship for that opinion being thus expressed in the report:—that it was not competent to the *Bank of Hindustan*, under the 12th, 50th, and 51st sections of the *Companies Act* of 1862, "by means of a single resolution, passed at one meeting and confirmed at a subsequent meeting, to alter the articles of association, and to authorize the creation of additional capital by the issue of new and additional shares."

We are sensible of the very great weight due to the authority of the distinguished Judge who delivered this opinion, which (whether the words in which it is expressed accurately convey His Lordship's meaning or not) might well be regarded by the Vice-Chancellor as an authority binding upon him; and it has been the chief cause of such difficulty as we ourselves have felt in dealing with these cases. That opinion, however, was not necessary for, and it cannot be said to have been the foundation of, the judgment of affirmance; the actual grounds of which (being the same in effect with the reasons of the Court below) were thus stated by the Lord Chief Baron immediately before the expression of their concurrence by the other four Judges present: "It appears to us,

(1) *Ante*, p. 11, n. (2) Law Rep. 6 C. P. 226, 227.

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therefore, that the agreement for amalgamation, which was the whole foundation of the transaction, having failed, the transaction itself wholly failed, and the Defendant never became a shareholder in the *Bank of Hindustan*."

Under these circumstances, the question being one of which the importance may possibly extend much beyond these particular cases and this particular company, my learned brothers and myself have not considered that we are either bound or entitled to treat the judgment of the Court of Exchequer Chamber as conclusive in favour of the objection thus taken to the resolution of August and September, 1864, which (in the view we take of the facts) is now for the first time presented as a dry, legal, and technical objection to the validity of shares issued and accepted *bonâ fide* for a valuable consideration which has not failed, and acted upon both by the bank and by all its shareholders of every class, to whom the facts were made known in every possible way during the period of more than two years which preceded the winding-up order, and never in any one instance called in question or impeached, either by the bank in its corporate capacity, or, until the present motions, by any shareholder therein. The Chancery suit, it must be remembered, was instituted by shareholders in the *Imperial Bank*, and not by shareholders in the *Bank of Hindustan*. The *Bank of Hindustan*, as a Defendant in that suit, affirmed and maintained to the utmost of its power the validity of what had been done; and so far as regards the position of those who had taken shares in the bank under the same circumstances with Mr. *Campbell* and Mr. *Hippisley*, they maintained it (in the opinion of the Vice-Chancellor) with success.

I forbear to inquire whether, under all these circumstances, a decision that it would have been open to the *Bank of Hindustan*, on the ground suggested, to deny the rights of shareholders to Mr. *Campbell* and Mr. *Hippisley*, could have been reconciled with equitable principles, or with the decision of Vice-Chancellor *Wood* in *Richmond's Case* (1) and with that of Vice-Chancellor *Wickens* in *Croom's Case* (2), with the case at law of *Royal British Bank* v. *Turquand* (3), or with the principles as to ratification and estoppel acknowledged as correct by all the learned Judges in *Alison's* case.

(1) 4 K. & J. 305. (2) Law Rep. 16 Eq. 417, 420. (3) 6 E. & B. 327.

I forbear to do so, because I am, for my own part, unable to see in what respect the necessary and substantial conditions of sects. 12, 50, and 51 of the Act of 1862 were really departed from by the resolutions of August and September, 1864.

There can be no doubt that these resolutions were passed unanimously at two extraordinary general meetings in the manner required by sects. 50 and 51 of the Act, and that they were duly registered. The objection depends wholly upon the language of sect. 12, which enabled this company "so far to modify the conditions contained in its memorandum of association, if authorized to do so by its regulations as originally framed or as altered by special resolution in manner hereinafter mentioned," (referring to sects. 50 and 51), "as to increase its capital by the issue of new shares of such amount as it thinks expedient." The statute does not prescribe any particular form in which this is to be done; it does not say that express mention must necessarily be made either of the memorandum of association, or (when a resolution altering in effect the articles of association is passed) of the articles of association; and I apprehend it is consistent with sound general principles, as well as with the express provisions of sects. 50 to 53, to hold that the powers given by sect. 12 may be well exercised, whenever the things authorized were in substance done by those who were made by the statute competent to do them.

Nor is there anything in the judgment of the Lord Chief Baron from which I can, with any certainty, infer that His Lordship thought that the resolution of August and September, 1864, would have been bad in form if it was not bad in substance. If the effect of that resolution was necessarily to alter the regulations of the company—that is, the articles of association as originally framed—by authorizing an increase of the capital by the issue of new shares which those articles did not authorize, then I think it was sufficient to enable the company to modify, by an actual issue of new shares, pursuant to that authority, the conditions as to the amount of the capital of the company contained in the memorandum of association. And it appears to me that such was the necessary effect of this resolution, although neither the memorandum of association nor the articles of association were in so many words mentioned therein.

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All the shareholders of the company must have imputed to them knowledge of the Act of Parliament, and also of their own memorandum and articles of association, and of the fact that the articles did not (as they stood before this resolution was passed) authorize the proposed increase of capital; and from the notices which convened the two extraordinary meetings it must have been clearly understood, that, without the sanction of those meetings, the proposed increase of capital could not be made. I entertain no doubt (nor does it seem to be that doubt was entertained on this point by any of the Judges in the Exchequer Chamber) that it was competent for two meetings to authorize an increase of capital, conditionally as much as absolutely, for a special purpose as much as for general purposes, and thereby to carry into effect an agreement the terms of which had previously been arranged, as much as to provide contingently for an agreement of any particular kind, if made at a future time. If I rightly understand the view of the Lord Chief Baron, it seems to have been, that the resolution was bad, as attempting to combine, *uno flatu*, two operations, viz., the authorization of the increase of capital by giving power to issue new shares, and the actual increase of such capital by the creation of such new shares—which by sect. 12 of the statute are contemplated as distinct, and the first of which under that section was a condition precedent to the second. But if this is the true interpretation of the judgment, I am obliged to say, with very sincere deference, that this view appears to me *hærere in cortice* and to lose sight of the substance. According to the terms of the Act of 1862 and the constitution of this company, it was not necessary that the second of these two operations should be performed by special or indeed by any resolution of shareholders at extraordinary general meetings. The authority to make the issue was indeed required to be given by a special resolution; but the power of issue when that authority was once given was capable of being exercised by the board of directors. The authority in this case being only for a special purpose, the capital was not really increased till the shares were issued and accepted pursuant to that authority. The words, therefore, of the resolution, "that the capital of the company be increased by the creation of 20,000 new shares," seem to me to be in truth

nothing more nor less than an authority for such increase by the board of directors, who proceeded on the faith of that resolution actually to issue the shares. Whatever would have been sufficient authority, if contained in the articles as originally framed, must also, I think, be sufficient, if expressed in similar terms in any resolution by which the articles might, in effect, be altered.

I put the question to counsel during the course of the argument, whether there would have been any doubt of the sufficiency of the authority, if the articles, as originally framed, had contained (in addition to what now appears in them) some such words as the following: "In the event of the directors succeeding in making an agreement for the purchase of the business and property of the *Imperial Bank*, after shares to the full amount of £2,000,000 have been issued, on the terms of paying for such business and property in shares of this company at £6 premium, to be issued to such shareholders in the *Imperial Bank* as may be willing to accept the same, the capital of this company shall be increased beyond £2,000,000, by the creation of such number of new shares, not exceeding 20,000 of £100 each, as may be necessary for the performance of such agreement; such shares to be issued to the persons and upon the terms stated in such agreement." I cannot discover any ground for doubting, that such a provision in the original articles would have been sufficient authority, under the 12th section of the Act, for the issue of new shares for the purposes of the supposed agreement, whenever made; and, if so, it seems to me that the equivalent words of the special resolution in the present case, though applicable to the fulfilment of an agreement already provisionally made, and not of a future and contingent agreement, are equally sufficient.

The case of *In re West India and Pacific Steamship Company* (which I think was correctly decided) was substantially different. There the question was, whether the Court of Chancery could confirm a resolution (which to be effective must have been passed under the powers of the *Companies Act*, 1867) for the reduction of the capital of a company. Such a reduction, under sect. 9 of the Act of 1867, could only be effected by special resolution, (*i. e.* by a resolution adopted and confirmed at two extraordinary general meetings), which was not to come into operation until an order of

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the Court confirming it (after proof of certain notices to and consents of creditors) should have been registered by the Registrar of Joint Stock Companies. And no such resolution could be passed unless (in language so far similar to that of the 12th section of the *Companies Act* of 1862) it was authorized "by the regulations of the company as originally framed, or as altered by special resolution." In the case cited, the regulations of the company as originally framed did not authorize any reduction of the capital; and no resolution had been passed to the effect of altering them, other than that for the actual reduction of the capital, to which the assent of the Court was then asked. But this resolution, until some order of the Court confirming it should be registered, was wholly inoperative under the statute; and, being inoperative, it could not itself authorize what it purported to do, or supply the want of that alteration of the articles, which was a condition precedent under the statute, independent of any order of the Court.

Upon the whole case I am of opinion that these appeals must prevail, and that the Vice-Chancellor's orders must be discharged.

SIR W. M. JAMES, L.J.:—

I desire only to add that we are of opinion that it is in the highest degree important for the safety of that large portion of mankind which has dealings in shares, and for the true interests of all shareholders, that the principle of the decision in *Royal British Bank* v. *Turquand* (1) should be adhered to and acted upon.

SIR G. MELLISH, L.J.:—

I entirely concur in the judgment of the Lord Chancellor.

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LORD SELBORNE, L.C.:—

I have now to deliver judgment in *Alison's Case*. The facts of that case have been sufficiently stated in the preceding judgment.

The appeal is from an order of Lord Justice *James*, sitting for he late Vice-Chancellor Sir *John Wickens*, by which he directed

(1) 6 E. & B. 327. 2 Jur. N.S. 663

the sums which *Alison* had paid to the *Bank of Hindustan* when he took his shares to be repaid with interest out of the funds of that bank. *Alison* had paid part, but not the whole, of the premium payable according to the terms on which the shares were issued; he had never paid any calls; and in March, 1866, his shares had been declared forfeited for non-payment of calls; so that his connection with the *Bank of Hindustan* (if a shareholder) was finally dissolved nine months before the order to wind up that bank, under which he never was settled on the list as a contributory. The action at law was brought against him in the name of the company by the liquidators, to recover the unpaid premium and calls, and the judgment in that action was in *Alison's* favour, upon the ground that he never was a shareholder. The Lord Justice, sitting for the Vice-Chancellor, was of opinion that this judgment was binding as between *Alison* and the company, and that it was conclusive in his favour upon the question raised by him in the winding-up, whether the consideration for the payments made by him to the company had not wholly failed, and whether he was not therefore entitled to receive back those payments. In that opinion we agree. We cannot relieve the liquidators against the estoppel created by that judgment, on the ground that, if evidence had been given in the action which was not given, or if the special case had been stated otherwise than it was stated, the result might have been different. A company in liquidation, like any other litigant, must be bound by the manner in which it conducts its own case. The liquidators' appeal, therefore, will be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. It is clear, I apprehend, that the judgment of the Courts of Common Law is not only conclusive with reference to the actual matter decided, but that it is also conclusive with reference to the grounds of the decision, provided that from the judgment itself the actual grounds of the decision can be clearly discovered. For instance, if in this case there had been an actual verdict declaring that *Alison* never was a shareholder, that would have been conclusive as between the parties in all future actions and suits, as establishing that he never was a shareholder. The

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only real difficulty in this case arises from the judgment not in form stating on which plea the Defendant should succeed, but only deciding that the company were not entitled to recover any portion of the sums they sought to recover in the action. And if the special case had left it open to the Court to decide in favour of the Defendant, upon several grounds I doubt whether technically we could have looked at what was said by the Judges for the purpose of discovering what were the real grounds of their decision. But upon reading the special case, it appears to me clear that the special case raised only one single question for the opinion of the Court, namely, the question whether *Alison* ever became a shareholder in the *Bank of Hindustan*, and that therefore the judgment that the company were not entitled to recover all, or any of the sums which they sought to recover in the action, is necessarily a decision also that *Alison* never had become a shareholder. Therefore, upon that ground, there is conclusive evidence in this case that he never became a shareholder in the bank. If he never became a shareholder, it appears to me that he is clearly entitled to recover back the sums which he paid for the purpose of becoming a shareholder, upon the ground that they were moneys paid upon a consideration which has wholly failed.

Solicitors for the Liquidators: Messrs. *Ashurst, Morris, & Co.*

Solicitors for the Executors of Mr. *Sassoon:* Messrs. *Thomas & Hollams.*

Solicitors for the Respondents: Messrs. *Gregory, Rowcliffes, & Rawle;* Messrs. *Flux & Co.;* Mr. *Pulbrook.*

Ex parte COTE. *In re* DEVEZE.

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1873
Nov. 7.

Bankruptcy—Bill of Exchange—Indorsement—Bill sent by Post—Property in Letter—Rules of French Post Office—Recovery of Letter by Sender—Revocation of Delivery—Mistake.

The rules of the French Post Office permit a person who has posted a letter to recover it at any time before it is despatched from the office where it is posted on complying with certain forms. Therefore, where a letter containing bills of exchange, indorsed to the person to whom the letter was addressed, was posted in a French post office :—

Held, that the property in the bills did not pass to the indorsee till the letter had left the office where it was posted.

C., a banker at *Lyons*, having received from *D.* a bill drawn on a firm in *Milan*, posted a letter addressed to *D.* in *England*, inclosing five bills of exchange indorsed to him. Before the mail left *Lyons*, *C.* received a telegram from *D.'s* agent at *Milan*, stating that the drawee of the bill refused to accept it, and telling him not to send any remittance to *D.* *C.* accordingly applied to the post office for a return of the letter containing the five bills; but through a mistake of his clerk the letter was not returned to him, but was despatched to *England* and delivered to *D.*, who soon afterwards filed a petition for liquidation :—

Held, that as *C.* had shewn an intention of recalling the letter before it left *Lyons*, which had only been frustrated by a mistake of his clerk, the property in the bills did not pass to the indorsee, and that they must be given up to *C.* :

Held, also, by *Mellish*, L.J., that even if the property in the bills had passed where the letter was posted, the delivery of the bills was revoked by both parties, and that the fact of their not actually getting back into the manual possession of the indorser through a mistake of the clerk made no difference.

THIS was an appeal from a decision of Mr. Registrar *Murray*, sitting as Chief Judge in Bankruptcy.

Mr. *J. L. Deveze* carried on business as a general merchant under the firm of *Heitz & Deveze*, having two houses of business, one in *London* and the other at *Lyons*, the latter being managed by his father.

Mr. *Marcus Cote* was a banker at *Lyons*, who had business transactions with *Deveze*. *Deveze* was in the habit of remitting to *Cote* from *England* bills of exchange drawn upon firms carrying on business in *France* or *Italy*, and *Cote* in exchange for them re-

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mitted to *Deveze* drafts on firms carrying on business in *England*. These drafts did not accurately represent the amount of the bills sent to *Cote*, after deducting discount and commission, because he usually retained a small balance in his hands on the account between them.

On the 11th of January, 1873, *Deveze* wrote a letter to *Cote* inclosing a bill of that date payable at three months, drawn by himself upon Messrs. *Montague*, of *Milan*, for 26,732 lire. This bill had not been accepted by Messrs. *Montague*, but one part of it had been sent to them at *Milan* for that purpose.

On the 14th of January *Cote* sent a letter to *Deveze*, inclosing bills on *London* houses, which he had purchased at *Lyons*, amounting altogether to £592. After the letter was posted, but before the departure of the mail, *Cote* received a note from *Deveze's* house at *Lyons* to the following effect:—

"Our house in *London* announces by telegraph as follows:—'*Montague* refuses to accept bills. Tell *Cote* to hold bills of *Montague*, and remit nothing.'"

On the receipt of this note *Cote* sent his clerk to the post office to endeavour to recover the letter which he had posted to *Deveze*. It appeared from a letter written by the director of the post office to *Cote* that, according to the regulations of the French post office, the writer of a letter is allowed to recover it from the Post Office after it has been posted, but before the hour for the despatch of the mail, upon producing a fac-simile of the letter and signing a formal requisition for the return of the letter.

Cote's clerk produced a fac-simile of the letter to the clerk of the post office, and understood him to say that the letter would be returned to him the next morning. The letter was separated from the other letters, and laid in the window of the post office; but as *Cote's* clerk did not again attend to claim it, and no formal requisition was signed, the letter was sent off in the ordinary course on the evening of the 14th of January, and reached *Deveze* in *London* on the 16th. *Cote* did not telegraph or write to *Deveze* to reclaim the letter as having been sent under a mistake, thinking, as he alleged, that it would be useless to do so.

On the 14th of January *Deveze* stopped payment, and issued

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circulars informing his creditors of the fact; and on the 17th *Deveze* filed a petition for liquidation, under which a trustee was appointed. *Deveze* did not open the envelope containing *Cote's* letter of the 14th and the bills for £592, but handed it unopened to the trustee. Under these circumstances the Registrar refused to order the trustee to deliver up the bills to *Cote,* and from this decision *Cote* appealed.

Much of the argument on behalf of the Appellant related to the question whether the bills remitted by *Cote* to *Deveze* were specially appropriated, as being in consideration of, and in exchange for, the bill for 26,732 lire, which had been dishonoured by Messrs. *Montague;* but in the view taken by the Court it became unnecessary to decide the question, though the Lord Chancellor was of opinion that there was no such appropriation.

Mr. *De Gex,* Q.C., and Mr. *Winslow,* for the Appellant:—

Independently of the question whether the bills for £592 had special reference to the bill drawn on *Montague,* and ought therefore to be returned to him when that bill was dishonoured, which we contend to be the case, we say that *Cote* never parted with the possession of the bills for £592, and that they never came into the legal possession of *Deveze* or his trustee. Whatever may be the law in *England,* it is clear from the evidence that in *France* a letter, although it has been posted, remains the property of the sender until the mail leaves the office where it is posted, and that the sender may recover it on complying with certain formalities. Therefore until the mail leaves the office the post office authorities hold the letter as the agents of the sender. In the present case the letter containing the English bills was reclaimed by *Cote,* and was separated from the other letters in order to be returned to him, and that it would have been so returned if it had not been for an accidental mistake—whether of *Cote's* clerk or of the post office clerk makes no difference. A bill of exchange does not pass by mere indorsement; there must be delivery to and acceptance by the indorsee. Here there was no delivery, for the bills were sent by mistake, and no acceptance, for *Deveze* had telegraphed to stop all remittances. If this had been a case of attempted stoppage of goods *in transitu* the stoppage would have been held effectual:

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Sadler v. *Belcher* (1); *Nicholson* v. *Bower* (2); *Salte* v. *Field* (3); *Richardson* v. *Goss* (4); *Litt* v. *Cowley* (5). Money can be stopped *in transitu* as well as goods: *Smith* v. *Bowles* (6).

Mr. *Davey*, and Mr. *Finlay Knight*, for the trustee:—

This is not a case of stoppage *in transitu*. *Cote* was not the vendor of goods. He was remitting a sum of money, being at the time, to some extent at least, indebted to *Deveze*. In *Smith* v. *Bowles* the money sent was in foreign coin, which in the eye of the English law is only bullion. The case conclusively shews that stoppage *in transitu* does not apply to payment of money. The only question really is whether *Cote* recovered the property in the bills by claiming them at the post office. In *England* there can be no question that the post office holds every letter that is posted as the agent of the person to whom it is addressed; and the evidence does not bear out the assertion that it is otherwise in *France*. The true effect of the French regulation is, that where a letter is posted the person to whom it is addressed becomes entitled to it, subject to a power in the sender to recover possession of it on his complying with certain formalities. *Cote* did not comply with these formalities, and therefore the right to the letter remained in *Deveze*.

LORD SELBORNE, L.C.:—

In this case I assume that if there had been no telegram from *Deveze*, and nothing had been done by *Cote* to reclaim the letter at the post office, the property in the five English bills would have passed to *Deveze* on the posting of the letter to him. But all the circumstances tend to shew that it was consistent with honesty and good faith that the letter should be reclaimed if that were possible, because although the evidence has convinced me that the remittance was made on a general account, and was not specifically appropriated by the bill sent by *Deveze*, yet there can be little doubt that the remittance would not have been made by *Cote* unless on the expectation that the *Milan* bill would be

(1) 2 Moo. & Rob. 489.
(2) 1 E. & E. 172.
(3) 5 T. R. 211.
(4) 3 B. & P. 119.
(5) 7 Taunt. 169.
(6) 2 Esp. 578.

honoured. The English firm sent in good faith to stop the remittance, although there was no specific appropriation. They not only authorized *Cote*, but ordered him to remit nothing; but when the telegram arrived he had actually put a letter into the post office containing further remittances, which, if not actually sent, he was expressly told not to send. According to the regulations of the French Post Office the sender of a letter has a *locus pœnitentiæ*, and has the power of reclaiming it after it is posted. *Cote* did reclaim his letter; he sent a clerk to reclaim the letter, and produced a fac-simile of it; and the letter was taken out by the clerk at the post office and set aside for him It is clear that this was done *bonâ fide* and in pursuance of the authority from *Deveze*, and the letter was not recovered only because *Cote's* clerk did not rightly understand what the post office clerk had said to him. He did not understand that the re-delivery to him was conditional on anything more to be done by him. He understood that the letter was to be given up to him next morning. It is clear from the letter of the director of the post office that the clerk misunderstood what was said to him, and did not understand that the letter could not be given up to him without a written requisition. Taking the evidence as a whole, there was a power of reclamation, there was a *bonâ fide* intention to exercise that power, and if there was an omission of what was necessary to be done, it was not only unintentional, but it arose from a misunderstanding of the manner in which the post office clerk expressed himself.

I think that the intention of the parties, and the acts done by them, are more important than the omission of the precise form in which their intention ought to have been expressed; and the result is, that the property in the bills did not pass to *Deveze*. The appeal must, therefore, be allowed.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The first question is whether the bills were ever really indorsed and delivered to *Deveze;* and, secondly, if so, whether they were ever legally returned. In order to make the property in the bills pass it is not sufficient to indorse them; they must be delivered to the indorsee or to the agent of the

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indorsee. If the indorser delivers them to his own agent, he can recover them; if to the agent of the indorsee, he cannot recover them.

The question therefore arises, of which party the post office is the agent. In this country, where the sender of a letter cannot get it returned after it has been posted, if the indorsee of a bill authorizes the indorser to send the bill through the post office, the bill as soon as it is posted becomes the property of the indorsee. But according to the regulations of the French Post Office a person who posts a letter may get it back on complying with certain forms at any time before the letter has left the town where it is posted. I am inclined to think that the effect of that rule is that the post office is the agent of the sender of the letter until it leaves the town, and that the indorsement of the bills contained in it is not complete till the letter is despatched from the town.

Then, did *Cote* entertain the intention of recalling the letter before it was despatched? There is abundant evidence that he did. In the first place there was a telegram instructing him not to send any remittance; therefore what *Cote* did he did with the consent and by the direction of *Deveze*. It would, in my opinion, be wrong to hold that the mistake of the clerk had the effect of making the property in the bills pass contrary to the intention of both the indorser and indorsee.

But even supposing the property in the bills did pass when the letter was posted, as it would have done in the English Post Office, still there is clear evidence that both parties assented to the revocation of the delivery of the bills, and the fact that by mistake the bills did not actually get back into the manual possession of the indorser was not sufficient to prevent the revocation from taking effect.

Solicitors for the Appellant: Messrs. *Abrahams & Roffey.*
Solicitor for the Respondent: Mr. *W. A. Crump.*

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Nov. 7, 14.

Inspectorship Deed—After-acquired Property—Possibility of Future Benefit—Moral Obligation.

The *C. Railway Company* owed money to *P.*, who was their engineer and agent, for preliminary expenses. In the year 1866, before the railway had been commenced, the *C. Company* sold their undertaking to three other railway companies, and an agreement was executed between them by which the three companies agreed with the *C. Company*, among other things, that the contract for the construction of the railway should be given to *P.* or his nominee.

P. was no party to this deed, but was employed as the agent of the *C. Company* in preparing it. In 1867 *P.* executed an inspectorship deed, by which he covenanted that he would get in and realize all his estate and effects, under the direction of the inspectors, for the benefit of his creditors, to be administered as in bankruptcy, and also that he would, whenever called upon to do so, assign to the inspectors all his estate and effects remaining undivided. And it was provided that as soon as all the said estate should be fully administered or assigned to the inspectors, the deed should operate as a full discharge to the debtor.

In 1871 *P.* nominated a firm of contractors for the construction of the railway, and received from them a sum of £3500 for so doing. The inspectors claimed this sum as part of his estate:—

Held, first, that as *P.* was not a party to the contract between the *C. Company* and the other three companies, and as there was no evidence that the *C. Company* had constituted itself a trustee for him, the expectation of his deriving a benefit from the contract was not such an interest as could be affected by the inspectorship deed:

Secondly, that the inspectorship deed only affected property which belonged to the debtor at the time of its execution, and that the sum in question being after-acquired property the inspectors were not entitled to it.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, sitting as Chief Judge in Bankruptcy.

Mr. *B. Piercy*, a civil engineer, was the engineer and promoter of a company called the *Chester and West Cheshire Junction Railway Company*, which was incorporated by an Act of Parliament passed in 1865, and had incurred considerable expenses in relation thereto.

In March, 1866, before the railways mentioned in their Act had been commenced, the company agreed to transfer their undertaking to three other companies, namely, the *Manchester, Sheffield*,

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and Lincolnshire Railway Company, the *Great Northern Railway Company*, and the *Midland Railway Company*.

On the 15th of June, 1866, an agreement under seal was entered into between the three last-mentioned companies of the first part, and the *Chester and West Cheshire Junction Railway Company*, thereinafter called the *Chester Company*, of the second part, which recited that the *Chester Company* had agreed to transfer the whole of their undertaking and powers of raising capital authorized by their Act of 1865, to the three other companies, and that the *Chester Company* had introduced into Parliament a bill to authorize such transfer, and also a bill to authorize them to construct certain extension railways, one of which was described as Railway No. 1. It was mutually agreed, in consideration of the said transfer, between and by the parties thereto (*inter alia*), that the three companies should, within a month after the passing of the *Cheshire Lines Act*, containing the provisions for transfer of the *Chester Company's* undertaking, pay to the *Chester Company*, or to Mr. *Benjamin Piercy*, their nominee, £7500 in cash, to cover the costs and expenses preliminary and in relation to the promotion, obtaining, and passing of the *Chester Company's Act*, 1865, and all other expenses and liabilities up to the 10th of March, 1866: and that the contract for the construction of the railways so to be transferred as aforesaid, and the said Railway No. 1, should be let to Mr. *Benjamin Piercy*, or his nominee, upon terms to be settled by the engineers of the three companies, or in case of difference, to be settled by arbitration upon the basis of payments in cash monthly on the certificate of the engineers of the three companies:

For the consideration aforesaid the *Chester Company* agreed, concurrently with the payment of the said sum of £7500, to procure the transfer of or surrender to the three companies, or their nominee, of all shares which had been created and issued under the Act of 1865, in order to the cancellation thereof, and also to pay all preliminary and parliamentary costs and expenses of and relating to the promotion and passing of the *Chester Company's* Act of 1865, and to indemnify the three companies against the same, and against all liabilities in respect of the undertaking of 1865, with certain exceptions therein mentioned.

Piercy was not a party to this deed, but he acted as agent for

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the *Chester Company* in getting it prepared, and in promoting the bills in Parliament for carrying it into effect.

The bill was eventually passed, and the three companies paid the sum of £7500 to *Piercy*, as the nominee of the *Chester Company*.

On the 15th of March, 1867, *Piercy* executed an inspectorship deed, which was duly registered under the 192nd section of the *Bankruptcy Act*, 1861. By that deed it was recited as follows:— "Whereas it has been proposed to the creditors that all the estate and effects of the debtor, subject to the proviso hereinafter mentioned, whether separate or joint with any other person or persons, shall be got in, realized, and administered under such inspection as hereinafter mentioned, and the creditors have assented to such proposal: and whereas all the estate and effects last aforesaid is and are now, according as the context may require, included in the expression hereinafter used of 'the said estate.'"

The deed contained covenants by the debtor that he would get in his estate and effects under the direction of the inspectors, and would observe all the stipulations of the deed, and conform to the directions of the inspectors.

The deed also contained the provisions usual in inspectorship deeds for realizing the debtor's estate and dividing the proceeds among his creditors. The following clauses were referred to as bearing upon the question at issue:—

Clause 1. "That the said estate shall, subject to the provisions of these Acts, be administered in accordance with the present bankrupt law in *England*.

Clause 2. "That it shall be lawful for the inspectors, in their or his discretion, to direct and authorize the debtor and his heirs, executors, and administrators, as occasion may require, under their or his direction and control, to carry on or conduct for the purpose of winding up and to wind up the said businesses, trades, and occupations, and the affairs and transactions thereof, and to collect, get in, and realize the said estate under the provisions of these presents; and for the purposes aforesaid to manage and realize the said estate and the assets invested therein or otherwise belonging thereto, and particularly to deal with all contracts entered into by the debtor either separately or jointly as aforesaid in such way and manner as the inspectors shall think expedient or desirable;

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and for all or any of the purposes of these presents to require the assistance of the debtor and his heirs, executors, and administrators in the mode and to the extent the inspectors shall judge proper, but not so as to interfere with the discharge by the debtor of his duties as an engineer, whether consulting or in chief, or otherwise."

Clause 21. "That at any time before the whole of the said estate shall have been fully administered, or before dividends to the amount in the whole of 20*s.* in the pound, shall have been paid to or realized and provided for all the said creditors, the said debtor shall, if the said inspectors or inspector require the same, effectually convey, assure, and assign all his said estate then remaining outstanding or not divided or not theretofore dealt with under the powers herein contained, to such person or persons as they or he may direct, in trust to be administered according to the law in bankruptcy among the said creditors respectively; and if any ultimate surplus shall remain after full payment and satisfaction of their respective debts or claims, and of all costs, charges, and expenses hereby authorized to be paid or otherwise provided for, then as to such ultimate surplus in trust for the said debtor, according to his right and interest therein."

Clause 23. "That if and when the said estate shall have been fully administered according to the provisions thereof to the satisfaction of the inspectors, they may certify the fact in writing under their hands, such writing to be indorsed upon or to refer to these presents; or in case all the then said estate shall be conveyed, assured, or assigned in pursuance of these presents and in the manner hereinbefore provided, such fact may be in like manner certified; and thereupon and thenceforth these presents (but only for the purpose and to the extent of this present clause, and subject to the proviso next hereinafter contained, and without prejudice to the rights of the creditors respectively to or over the property so thereinbefore conveyed or assured, or to or over any dividends or funds for dividends then provided, but not actually paid to the creditors respectively) shall operate and be a release and discharge to the debtor, his heirs, executors, and administrators, as fully and effectually, and in like manner, as an order of discharge under an adjudication of bankruptcy against the debtor,

and may be pleaded and used accordingly, and as a bar to and in defence of all actions, suits, and proceedings against the debtor in respect of any of the debts, claims, and demands of all or any of the said creditors respectively."

On the 25th of March, 1870, *Piercy* and the inspectors executed a deed, whereby they assigned all the outstanding estate of *Piercy* which was then ascertained to *James Fraser* absolutely, in consideration of £1750. The property comprised in the deed was enumerated in the schedule, and consisted of shares in companies and unpaid debts and claims of various kinds. Among these was included the following item:—"Claim or rights of debtor in respect of the *Chester and West Cheshire Junction Railway Company* against the *Cheshire Lines Company or Companies.*"

In the year 1871 *Piercy* agreed with Messrs. *Rose & Knight*, railway contractors, in consideration of the sum of £3500, to nominate them to the three companies as contractors for the railways which were to be constructed, and to use his best efforts to obtain them the appointment. The nomination was approved by the engineers of the three companies, and the contract was granted to *Rose & Knight.* The deed of contract was executed by the companies on the 25th of October, 1871, and recited the agreement of the 15th of June, 1866, and the nomination of *Rose & Knight* by *Piercy.*

The sum of £3500 was accordingly paid to *Piercy.* The inspectors, on being acquainted with this payment, claimed the sum from *Piercy*, and applied to the Registrar for an order directing him to pay it over to them.

The Registrar made the order asked for, and *Piercy* appealed from this decision, *Fraser* appearing by counsel, and renouncing in favour of the inspectors.

Mr. *Roxburgh*, Q.C., and Mr. *Locock Webb*, for the Appellant:—

No property of the debtor was bound by the inspectorship deed except what would have passed to his assignees if he had been made a bankrupt. There is no clause affecting after-acquired property. The money in question was earned by him subsequently by his own personal exertions, and was not in any sense due to him

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at the date of the deed. He was no party to the agreement of June, 1866, between the four companies. The agreement that he should have the contract or the nomination of the contractor was only between the four companies. He could not have sued upon it either at law or equity. No agreement is proved between him and the *Chester Company* which would constitute the *Chester Company* trustees for him, and they might have released the other companies from the agreement without his consent. Moreover, whatever claim *Piercy* may have had under the agreement of 1866 was assigned to *Fraser* under the deed of the 25th of March, 1870.

Mr. *De Gex*, Q.C., Mr. *Beresford*, and Mr. *Brough*, for the inspectors:—

The assignment to *Fraser* does not stand in our way, for *Fraser* appeared by counsel before the Registrar and renounced all his interest in the money in our favour. We contend that whatever benefit *Piercy* gained in consequence of the agreement between the *Chester Company* and the other three companies was bound by the inspectorship deed. If *A.* contracts with *B.* to confer a benefit on *C.*, and *C.* becomes bankrupt, whatever *C.* gets under the contract will pass to his assignees. There is no authority to the contrary. It does not matter whether *C.* could have brought an action himself upon the contract; it is sufficient if it was such a benefit as could be sold. In the present case it is probable that *Piercy* could have sued in the name of the *Chester Company*: *Webb* v. *Rhodes* (1). As between him and the *Chester Company* there was sufficient to constitute them trustees for him. This is evidenced by the fact that part of the consideration for the £7500 was his services in promoting the company. But whatever his interest was, it was capable of being sold, and there was nothing illegal in his selling it. We also contend that after-acquired property was bound by the terms of the inspectorship deed. Such a deed differs from an assignment. In bankruptcy all property acquired after the commencement of the bankruptcy and during its continuance vests in the trustee: *Bankruptcy Act*, 1869, s. 15, sub-s. 3; and by analogy to that provision all property coming to a debtor

(1) 3 Bing. N. C. 732.

during the continuance of an inspectorship must be bound by the deed. The inspectorship is not concluded till twenty shillings in the pound have been paid, or until the debtor has executed an assignment under the 23rd clause of the deed. The assignment to *Fraser* was not made under that section, it was only an assignment of specific parts of the outstanding estate.

LORD SELBORNE, L.C.:—

We have no doubt whatever in this case. The first point argued was, that at the time of the inspectorship deed, dated in March, 1867, Mr. *Piercy*, the debtor, was entitled, as part of his estate within the meaning of that deed, to some right against the three railway companies which have been mentioned, which right is in effect represented at the present time by a sum of £3500 obtained by him by the sale of the alleged right to somebody else in July, 1871. Now that so-called right accrues, if at all, in this manner: It appears that Mr. *Piercy* had been engineer and promoter of a railway company which never constructed any railway, and which parted with its *status*, and whatever it had to part with, to other companies by an agreement which was made in the month of June, 1866. It appears also that in the negotiation of that agreement Mr. *Piercy*, who was a creditor to the amount of £7500 of the original *Cheshire Company*, acted as the agent of that company, and was, therefore, perfectly cognizant of what took place; he also acted as their agent in promoting the bills in Parliament, which were necessary for the purpose of effecting the agreement between the companies. The agreement itself, which is under seal, is made between the companies, and is an agreement to which Mr. *Piercy* is no party. It consists entirely of certain mutual covenants between the four companies, of which the *Chester Company*—for whom he had been acting as engineer and as promoter and agent —was one. One of the clauses in that agreement dealt with, as between the companies, the debt of £7500 due to him from his own company in this way: it provided that the debt should be assumed by the purchasing companies, and should be paid by them either to the selling company or to Mr. *Piercy* as their nominee. Clearly that was not an agreement with *Piercy* in any

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way whatever, direct or indirect. It was an agreement between the companies which would have been satisfied by the payment of that money to the selling company. If they had done so, *Piercy* would have had no claim whatever against the purchasing companies. With regard to the matter now in question, it stands thus: the arrangement was that, in contemplation of the future making of the lines, for which the selling company had been originally constituted, by the purchasing companies, those companies agreed to let the contract to Mr. *Piercy* upon certain terms. Mr. *Piercy* is no party to the deed, and in no manner or form whatever entered into any contract upon that occasion — he is as free as if no such agreement had ever been made, and it is not with him but between the companies *inter se* that this arrangement is made. In my opinion Mr. *Piercy* is a mere and entire stranger to that contract. The contracting companies were complete masters of it from that time until the year 1871, when something was actually done upon the footing of it with their concurrence, when they entered into the contract with Messrs. *Rose & Knight*. But at the time when Mr. *Piercy* executed the deed of inspection in March, 1867, that contract vested in him no property at law or in equity—no right of suit or action at law or in equity in his own name, or in any other person's name, or any power which he could exercise for his own benefit.

That being so, the inspectors can have no right to the use of money, unless the second argument which has been addressed to us prevail, viz., that this deed of inspection practically bound all property whatever which Mr. *Piercy* might acquire until one of two events contemplated happened—one of them being the payment of 20*s.* in the pound to all the creditors; and the other being the granting of a certain certificate founded upon the assignment of the then existing property. That is, in my judgment, a mere question of the construction of the deed. Neither of those events has happened. He has not paid 20*s.* in the pound, and he has not assigned his remaining estate, and he has not received the certificate which would be equivalent to a discharge. If, therefore, the large construction suggested, that his future property would pass, can be maintained, it would appear that the £3500, in fact, obtained by him in the year 1871 by selling such

power of recommendation as he might *de facto* then possess, would be bound by the deed, although such power was not an interest at law or in equity, or property in any sense. But is that the construction—the sound construction—of the deed, which, in my judgment, is not controlled as to its construction by anything in any Act of Parliament? I think not. The material parts which it seems to me necessary to mention for the purposes of my decision are found in the recitals, and in clause 21 of the document itself.

[His Lordship then read the recital, as set forth above, and continued:—]

In my judgment, according to the natural meaning of the words, "the estate and effects of the debtor," not mentioning anything not then in existence, would extend only to his then existing "estate and effects," unless words were elsewhere found in the deed to shew an intention to give them a larger operation; because, first of all, the "estate and effects of the debtor" naturally refer to that which at the date of the contract was so described; secondly, they are to be got in, realized, and administered, and the words "whether separate or joint with any other person or persons," confirm this construction.

We have both of us carefully looked through the deed, and we have found nothing whatever in the context of any part of it which tends to support the contention that those words were meant to apply to after-acquired property. Indeed, it seems to us that the 2nd and the 21st clauses rather tend to a contrary conclusion. The 2nd clause provides "That it shall be lawful for the inspectors in their or his discretion to direct and authorize the debtor, and his heirs, executors, and administrators, as occasion may require, under their or his discretion and control, to carry on or conduct for the purpose of winding up, and to wind up the said businesses, trades, and occupations, and the affairs and transactions thereof, and to collect, get in, and realize the said estate, under the provisions of these presents." Now, it is to be observed that the expression "his executors or administrators" could only apply to specific property bound by the deed, and not to uncertain future acquisitions, and "the business, trades, and occupations, and the affairs and transactions thereof" could only apply to the existing businesses,

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and could not contemplate his entering into any new transactions. Then the sentence proceeds thus: "and for the purposes aforesaid to manage and realize the said estate and the assets invested therein or otherwise belonging thereto, and particularly to deal with all contracts entered into by the debtor either separately or jointly as aforesaid, in such way and manner as the inspectors shall think expedient," which *primâ facie* relates to existing contracts—contracts entered into either separately or jointly—and not future contracts. And lastly, his engagement to do these things under the direction of the inspectors is subject to this proviso: "but not so as to interfere with the discharge by the debtor of his duties as an engineer, whether consulting or in chief, or otherwise." It was therefore contemplated that from and after the date of the deed there would be certain things which he would be at liberty to do on his own account, independently of and notwithstanding his engagements under the deed. Then the 21st clause is this: "That at any time before the whole of the said estate shall have been duly administered,"—looking very much as if it was a definite thing, which would run off in the natural course of events—"or before dividends to the amount in the whole of 20*s.* in the pound shall have been paid to or realized and provided for all the said creditors"—shewing distinctly that the administration of the whole of the estate was contemplated as a thing which might have happened, though 20*s.* in the pound should not have been paid—"the said debtor shall, if the inspectors or inspector require the same, effectually convey, assure, or assign all his said estate then remaining outstanding, or not divided, or not theretofore dealt with under the powers herein contained." Those words appear to me to contemplate the assignment of the estate, of which the quantum was ascertained at the date of the deed, which might be afterwards diminished by dealings under the deed, and of which a definite part would at any time subsequent to those dealings be remaining outstanding. I will add that, as far as I can judge, it would be unreasonable, having regard to the nature, purposes, and object of such a deed, so to extend its operation in the way now contended for by the Respondent. For these reasons I am of opinion that the order of the Registrar cannot be sustained, and the appeal must be allowed.

SIR G. MELLISH, L.J.:—

I am of the same opinion. With respect to the first point, it appears to me that in order that this sum may come within the scope of the deed, there ought to have been evidence that there was a contract between Mr. *Piercy* and the original *Chester Company* that, for a valuable consideration moving from Mr. *Piercy*, he should have the benefit of the contract which the *Chester Company* was to enter into with the other three companies for the employment of Mr. *Piercy;* or else it must be proved that there were such facts in the case as would, in a Court of Equity, make the *Chester Company* trustees for Mr. *Piercy* with reference to that covenant, so as to entitle Mr. *Piercy* to use the name of the *Chester Company* in suing the other three companies if they refused the benefit of the covenant. Now, the actual facts appear to be these: Mr. *Piercy* was the promoter and engineer of the *Chester Company*, and as such had a reasonable expectation that if the company had not sold those lines to the other three companies he would have the benefit of any contract that might be made for the making of those lines. They probably would either make a contract with him, or else would make a contract with somebody whom he would appoint to be contractor; but he had no legal right to that privilege. If they had chosen to quarrel with him, and to give the contract to some totally different person, he would have had no remedy at law or in equity, he merely had a probable expectation. Then he, having that expectation, is employed by the company as their agent to negotiate the sale of their lines to the other three companies, and then, I daresay with the consent of the directors of the *Chester Company*, he puts in a clause for his own benefit, by which the other three companies are made to covenant with the *Chester Company* that they will employ Mr. *Piercy* or his nominee. But he gave no consideration for that. In my opinion the *Chester Company*, if they had happened to quarrel with him after that contract had been made with the other three companies, might have released them, or might have refused to enforce the covenant. Mr. *Piercy* may have had a sort of moral claim—a probable expectation that he would get this benefit—but he had no right that he could enforce either at law or equity. In my opinion,

L. C. and L. J. M. 1873 *Ex parte* PIERCY. *In re* PIERCY.

therefore, he had no such right as would have passed, in case he had been made bankrupt, to his assignee.

Then, with respect to the second point, the Lord Chancellor has called attention to the material clauses of the deed, and I do not think it is necessary to go through them again. It was admitted, as I understood it, that in an assignment of all a man's estate and effects for the benefit of all his creditors, his future estate, unless expressly referred to, would not pass. In my opinion there is no difference in that respect between an assignment for the benefit of creditors and a deed for winding up under inspection. The real essential difference between the two is this, that whereas the assignment for the benefit of a man's creditors under the operation of the Act of 1861 passes all his estate and effects, including *choses in action*, to the trustee, so as to give the trustee the right to sue at law, an inspectorship deed is only in fact an assignment in equity, leaving the legal estate still in the debtor's hands. It is an assignment in equity, and there is in most deeds that I have seen power given (in order to give security to the creditors of the debtor, should he abuse the powers that he has in consequence of the legal estate remaining in him) to the inspectors to call upon the debtor at any time to assign his property. That power is contained in the present deed, and if it had been executed it would have been an assignment of his then estate and effects only. It would not have passed his future estate and effects.

I am therefore of opinion that the right to this sum never passed to the inspectors, and that the order of the Registrar must be discharged.

Solicitor for the Appellant: Mr. *H. Skynner.*
Solicitors for the Respondent: Messrs. *Plews, Boyer, & Baker.*

In re HEATHCOTE'S TRUSTS.

L. JJ.
1873
Nov. 8,

Divesting—Gift over—Contingency restricted to Duration of Life Estate.

A testator gave a fund to his widow for life, and after her death upon trusts in moieties for his two daughters during their respective lives, with ulterior trusts for their children respectively, and limitations in default of children of either, upon the trusts of the other moiety; and if neither daughter should have a child who should become entitled, then upon trust for his two sons, to be equally divided between them, their respective executors, administrators, and assigns; but if either of them died without issue living at his decease, then the whole to be in trust for the other of them, his executors, administrators, and assigns; and if both of them died without issue living at their respective deaths, then the fund should be in trust for Mrs. *S.*, her executors, administrators, and assigns; but if she should die without leaving issue at her decease, then it should be in trust for the daughters of *P. D.* living at the determination of the prior trusts. The testator's daughters survived the widow, and died childless. The sons both died without issue in the lifetime of the surviving daughter, who became tenant for life of the whole. Mrs. *S.* survived the daughters, and afterwards died without issue; upon which the representatives of a daughter of *P. D.*, who had survived Mrs. *S.* only one day, claimed the fund:—

Held (reversing the decision of *Malins*, V.C.), that Mrs. *S.*, having survived the tenants for life, took an absolute indefeasible interest, and that the gift over to the daughters of *P. D.* did not take effect; for that if a fund is given to *A.* for life, and then to *B.*, with a gift over if *B.* dies without issue, death without issue in the lifetime of *A.* is taken to be intended, unless there be a context extending it to death without issue at any time.

The canons in *Edwards* v. *Edwards* (1) approved.

THIS was an appeal from an order of Vice-Chancellor *Malins*.

Robert Heathcote, by will dated the 10th of January, 1811, directed his trustees to pay the income of a mixed fund arising from his residuary personal estate and the proceeds of the sale of his real estate to his wife during her widowhood, and after her decease or second marriage to pay one moiety of the income to his daughter *Mary Ann* during her life for her separate use, and the other moiety to his daughter *Maria* during her life for her separate use. And the testator directed that after each daughter's death his trustees should stand possessed of that moiety of which she had received the income upon certain trusts in favour of her

(1) 15 Beav. 357.

L. JJ. 1873 *In re* HEATHCOTE'S TRUSTS.

children, and in default of children becoming entitled, then upon the trusts of the other moiety. The testator then proceeded as follows:—

"Provided always, that if neither of my said daughters, *M. A. Heathcote* and *Maria Heathcote*, shall have any child who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or be previously married, then and in such case the said trust moneys, stocks, funds, and securities, subject and without prejudice to the trusts hereinbefore declared thereof, shall be upon trust for my sons *William Samuel Heathcote* and *George Deare Heathcote*, equally to be divided between them as tenants in common, and their respective executors, administrators, and assigns. But in case either of my sons shall depart this life without leaving issue of his body lawfully begotten at the time of his decease, then the whole of the said trust moneys and premises shall thenceforth devolve and be upon trust for the other of my sons, his executors, administrators, and assigns. But in case both my said sons shall depart this life without leaving issue of their respective bodies lawfully begotten living at their respective deaths, then the said trust moneys, stocks, funds, and securities shall be upon trust for *Mary Heathcote*, spinster, her executors, administrators, and assigns. But in case the said *Mary Heathcote* shall depart this life without leaving any issue of her body lawfully begotten living at the time of her decease, then the said trust moneys, stocks, funds, and securities shall be upon trust for such one or more of the daughters of my brothers-in-law *Philip Deare* and *George Russell Deare* respectively, now living or hereafter to be born, as shall be living at the time when the trusts hereinbefore declared shall determine, to be equally divided between or amongst such daughters, if more than one, share and share alike, and for her and their respective executors, administrators, and assigns."

The testator's wife and his sons and daughters named in the will all survived him. The widow died in 1823, leaving the four children surviving. Neither daughter had any son who attained twenty-one, or any daughter who attained that age or married. The survivor of the two daughters died in 1866. The two sons had both died in her lifetime without leaving issue.

Mary Heathcote (afterwards Mrs. *Soutten*) died without issue on the 8th of April, 1872. At that time there was living only one of the daughters of the testator's brothers-in-law, namely, Mrs. *Rainier*, and she died on the following day.

The funds representing the testator's residuary estate having been paid into Court under the *Trustee Relief Act*, Mrs. *Rainier's* personal representatives petitioned for payment out to them, and Vice-Chancellor *Malins* made an order accordingly (1).

Mrs. *Soutten's* representatives appealed.

(1) 1873. July 25.

SIR R. MALINS, V.C.:—

The events that have happened are these: The will was dated in 1811. The testator's widow, the tenant for life, died in 1823, leaving the two daughters surviving. The two daughters both died without issue. The surviving daughter was Mrs. *Angelo*, who died in 1866; she, therefore, was surviving tenant for life of the whole fund in her lifetime. The two brothers had died without issue; and she having died in 1866, *Mary Heathcote*, then Mrs. *Soutten*, thereupon went into possession of the property; the fund is now rather less than £10,000 consols. Mrs. *Soutten* died on the 8th of April, 1872; and the daughter of one of the *Deares*, namely, Mrs. *Rainier*, whose legal representatives the Petitioners are, survived her one day, and died on the 9th of April, 1872.

Now, if I take it as a series of limitations, nothing can be more simple. Here is the widow of the testator for life, with remainder to his two daughters for their lives, with remainder to the children of each after her death—sons at twenty-one, daughters at twenty-one or on marriage, in the usual way; failing the issue of the daughters, to the two sons of the testator, and if either of them died without leaving issue, to the survivor; and if both died—which is the event that has happened—then to *Mary Heathcote* as a gift over to her; and if she died without leaving issue, then over to the daughters of the two *Deares*, represented by Mrs. *Rainier*.

The life estate of the widow is gone, the life estates of the daughters are gone, the remainders to their issue are gone, and the two sons are dead without issue, and Mrs. *Soutten* is also dead without issue. The property has been dealt with, by everybody assuming that Mrs. *Soutten* became entitled. It was held for her for life, and upon her death the question arises, who became entitled? In the order of limitations nothing can be more clear than that Mrs. *Rainier*, who survived her one day, became entitled; but Mr. *Cotton*, on behalf of the representatives of Mrs. *Soutten*, contended that all these gifts were to fail unless the events took place in the lifetime of the tenant for life. The tenancies for life from which he argued were tenancies for life of the daughters; but if that argument were to be attended to, it proves too much, because the first life estate here is that of the widow, who died in 1823, and the sons survived her. Therefore, if that argument were to prevail, the first son who died without issue, having survived the first tenant for life, became absolutely entitled, subject to the limitations to his sisters and their issue; and therefore neither Mrs. *Soutten* nor Mrs. *Rainier* could be entitled. But the argument

L. JJ.
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In re HEATHCOTE'S TRUSTS.

Mr. *Cotton*, Q.C., and Mr. *H. Lewis*, for the Appellants:—

The operation of the divesting clause upon the gift to Mrs. *Soutten* is to be confined to death without issue before the gift to

proceeded on the assumption that *Mary Heathcote*—that is, Mrs. *Soutten*—did become entitled, and that upon her death her representatives became entitled. But instead of the gift over taking effect, it failed, because she did not die without issue in the lifetime of the tenant for life. The authority relied upon was the case of *Edwards* v. *Edwards* (15 Beav. 357). That certainly is a very different case, and I am not prepared to say that I could go the whole length of the rules laid down by the Master of the Rolls in that case. There is no doubt whatever that when you give property to *A.* for life, with a gift over to another person, and provide that, if that person dies, then over, there death is spoken of as a contingent event; it must have reference to a particular period in order to give effect to the contingent expression; it means, if he dies before the period when the property is divisible—that is, during the tenancy for life. So if you give property to *A.* absolutely, and, if he die, to *B.*, that means, if he die in the lifetime of the testator; in other words, it is a provision against lapse. But I am very much inclined to think that some of the rules laid down by the Master of the Rolls in *Edwards* v. *Edwards* can hardly be sustained, because the result would be that, if you give property to *A.* for life, with remainder to *B.* in fee, with a declaration that, if he die without issue living at the time of his death, it is to go over, then the gift becomes absolute the moment the devisee in remainder survives the tenant for life. That certainly is contrary to the old rules of law, and I think it is not sustainable on any principle. On that account also I am unable to concur in the judgment of the Master of the Rolls in another of the authorities cited by Mr. *Cotton* — namely, *Slaney* v. *Slaney* (33 Beav. 631)—which is this: A devise to *A.* for life, remainder to *B.* in fee. Nothing, therefore, can be more simple—the tenant for life, remainder in fee. But if *B.* should die leaving issue, then to the issue, and, if that issue die, then over. Held, that *B.* became absolutely entitled to the fee on surviving *A.* That is clear; it means, if he shall die without issue, answering to the dying without issue in the lifetime of the tenant for life. There is, no doubt, a considerable inconvenience in keeping property in suspense during the whole term of the natural life. If you give property to *A.*, with remainder to *B.*, and, in the event of his dying without leaving issue, to *C.*, no doubt you keep the property in suspense during the whole of the lifetime of *B.* There could not have been that difficulty if *B.* had been mere tenant for life, with remainder to his issue. I am therefore unable to concur in that case; but I do concur in a later case of the Master of the Rolls, in which, I think, he came to an entirely opposite conclusion himself; and that is the case of *Milner* v. *Milner* (34 Beav. 276). In that case leasehold property was assigned to *A.* for life, and, after his decease, to *B.*—a regular remainder; but, if he should die without issue living at his death, then to *C.*; it was held that "dying without issue" was not confined to the death of the tenant for life. The Master of the Rolls says: "I do not mean to impugn

her comes into possession, according to the fourth rule in *Edwards* v. *Edwards* (1), approved in *Dean* v. *Handley* (2) and *In re Hill's*

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the authority of *Edwards* v. *Edwards*, but I am not clear that this case does not come within the second rather than the fourth class of cases there referred to. But all general rules of construction are subject to this, that a testator or a settlor may, if he pleases, exclude these rules by the use of exact words to denote his intention; and this, I think, he had done here." This case, therefore, I think, is within that decision; and I think it is regulated by *Smith* v. *Spencer* (6 D. M. & G. 631). That was a decision of Lord *Cranworth*, and the point is this: It was property directed to be held in trust for *A.* in fee if he should attain twenty-one, but if he should not leave any child or issue living at his decease, then over. He attained twenty-one; therefore upon this principle the gift over ought to have failed. He died ten years after attaining twenty-one, without issue, and the gift over was held to take effect.

Now that case is a very high authority. It is a decision of Lord *Cranworth*: but it seems that after he had given judgment he entertained some doubt. He had given judgment affirming the decision of Vice-Chancellor *Stuart*. He afterwards had it re-argued, because he thought there might possibly be some doubt. It was there contended that upon his attaining the age of twenty-one years the gift became absolute. The Lord Chancellor said he "thought the Vice-Chancellor was perfectly right; and without expressing any opinion on the rule of construction which had been relied upon, the rule must give way to the express words in this will, which in his opinion were conclusive against the contention of the Appellant: he should therefore dismiss the appeal and say nothing about costs." Then the Lord Chancellor mentioned the case the following day, and stated that, having disposed of it without hearing both sides, he would prefer that it should be regularly argued, and it might therefore come again into the paper as a part heard appeal. It was then re-argued, and the Lord Chancellor said "he was glad the case had been fully argued, though the result was that he had come to the same conclusion at which he had formerly arrived. His Lordship, after noticing that cases like the present generally depended each upon its own particular circumstances, went into a minute examination of the wording of the will, and stated his opinion to be that the gift to *F. S. Spencer* was not a contingent gift as in the case of *Home* v. *Pillans* (2 My. & K. 15), but an absolute gift. On the death of the testatrix, the property vested in *F. S. Spencer* on his attaining twenty-one, as equitable tenant in fee, subject to be divested in the event of his dying without issue, which event had happened. The appeal must, therefore, be dismissed, but without costs." *Home* v. *Pillans* there referred to was a gift to *A.* on attaining twenty-one, and if she should die, over; which was there construed by Lord *Brougham*, in my opinion most properly, as meaning to die before the period of vesting. It was a contingent gift.

I do not go into the other cases, such as *Hill's Trusts*, which was a decision of Vice-Chancellor *Bacon*, following *Edwards* v. *Edwards*. Some other cases were cited, but I cannot help thinking that there is one authority,

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(1) 15 Beav. 357.

(2) 2 H. & M. 635.

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L. JJ. 1873 *In re* HEATHCOTE'S TRUSTS.

Trusts (1). The Vice-Chancellor laid stress on *Milner* v. *Milner* (2), but in that case the Master of the Rolls expressly admitted the rule, though he held the case to be taken out of it by the context. Here the context, if anything, is favourable to the application of the rule.

Mr. *Pearson*, Q.C., and Mr. *Whately*, for Mrs. *Rainier's* representatives:—

The cases on this subject are considered in *Cooper* v. *Cooper* (3). In *Edwards* v. *Edwards* (4), and the cases on which it was founded, there was something in the context of the will supporting the view that the gift was intended to be indefeasible as soon as the prior interest had determined, and we submit that *Edwards* v. *Edwards* is not to be taken as laying down a dry rule for confining the contingency to the duration of the prior interest without any help from the context.

Mr. *Dauney*, for the trustees.

Bowers v. *Bowers* (Law Rep. 8 Eq. 283; Ibid. 5 Ch. 244), which considerably infringes on this doctrine of *Edwards* v. *Edwards*, though one of the Lords Justices professed not to do so. *Bowers* v. *Bowers* was an appeal from me: a case in which, it will be remembered, a testator directed his property to be equally divided and paid to his four children. It begins with an absolute gift; it then provides that if any of them should die without issue it should go to the survivors; but leaving issue, to go to the issue. I held that was a provision against lapse. If any of them died without issue, then the living children were substituted for them. Lord *Hatherley*, in giving judgment, said he should have agreed with me if it had not been for the gift for the children. I confess I am unable to see the difference; however he saw it there, and the Court decided that instead of being absolute gifts they were cut down to tenancies for life with remainders to their children. I consider that that infringes on these general rules. This, however, is a case in which I must act according to the plain view of the intention of the testator: To the testator's widow for life, remainder to the daughters for life, remainder to their issue, remainder to the sons absolutely, with executory bequests over, that is, cross bequests—this being personal property—if either of them died without issue: with a further executory bequest over to Mrs. *Soutten*, and with a further executory bequest over to Mrs. *Rainier*, if, as the event happened, Mrs. *Soutten* died without leaving issue.

The consequence is that the Petitioners, who are the legal representatives of Mrs. *Rainier*, are entitled to the fund.

(1) Law Rep. 12 Eq. 302.
(2) 34 Beav. 276.
(3) 1 K. & J. 658.
(4) 15 Beav. 357.

SIR W. M. JAMES, L.J.:—

I am of opinion that the rules laid down in *Edwards* v. *Edwards* (1), as far back as the year 1852, and followed in other cases without any expression of dissent or doubt in any branch of the Court, are simple, intelligible, and very beneficial in the administration of estates. The rule applicable to the present case is, that where there is an absolute gift to vest in possession at a future time, and a gift over in case the legatee should die without issue living at his decease, this *primâ facie* is to be taken to mean if he should die without issue before he is entitled to call for delivery, as it would be very inconvenient that, after delivery, the subject of gift should be liable to go over on his death without issue. The rule, therefore, is to imply that death without issue before the period of distribution is intended. That being the rule, the question on each particular will is, whether it contains anything inconsistent with or repugnant to the insertion of the words "before the period of distribution," or other words to that effect, in every part of the will in which the gift over is mentioned. If we insert these words here the whole will is consistent, there is nothing in them repugnant to any intention expressed by the testator, and the only peculiarity in this will is, that the gift over occurs not merely in one limitation, but several times. That seems to me to make no difference; there is no reason why the rule should not apply to a series of gifts over as well as to one. I am of opinion that the rule ought to prevail, and that Mrs. *Soutten* took an absolute interest, so that her representatives are now entitled to the fund. I carefully abstain from referring to any expression in the will which seems to support this view, lest it should be argued hereafter that our decision went on the particular words of the will. I go on this ground, that the rule applies unless there are words in the will to prevent its application, and that in this will there are not any words to take the case out of the general rule.

7 H L 416

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Birch, Ingram, Harrison, & Co.*; Mr. *W. J. Mitton*; Messrs. *A. F. & R. W. Tweedie.*

(1) 15 Beav. 357.

L. JJ.
1873
Nov. 22.

SAYERS *v.* CORRIE.

[1873 S. 195.]

CORRIE *v.* SAYERS.

[1873 C. 226.]

Practice—Transfer of Cause—Suits relating to the same matter.

Post 288

The trustees of a marriage settlement filed a bill to have the trusts carried into execution, and marked the cause for *Malins*, V.C. A few weeks afterwards the husband and wife filed a bill to have the settlement set aside, or rectified in a way which would give the wife entire control over the fund. This cause was marked for the Master of the Rolls. The trustees applied to have the second cause transferred to the Court of *Malins*, V.C. :—

Held, that the second bill ought to have been filed in the same Court as the first, and that the Plaintiffs in the second cause must pay the costs of the application to have it transferred to the Vice-Chancellor, and that regard could not be had to the circumstance that the arrear of causes before the Vice-Chancellor was very heavy.

THIS was a motion for transfer of a cause.

The bill in *Sayers* v. *Corrie* was filed on the 25th of July, 1873, by *Sayers* and *Bonnor*, the trustees of two deeds executed on the 5th of August, 1868, previous to the marriage of Mr. and Mrs. *Corrie*, against Mr. and Mrs. *Corrie* and their two infant children. One deed was a conveyance of property of the wife in trust for sale, and the other a settlement of the proceeds in the usual form. The bill stated to the effect that Mr. and Mrs. *Corrie* charged the Plaintiffs with having deluded them into executing the deeds in ignorance of their contents, and were constantly threatening to have them set aside. It prayed that the trusts of the two deeds might be carried into execution by the Court, that the Plaintiffs might be discharged from being trustees, and, if necessary, that new trustees might be appointed. This suit was attached to the Court of Vice-Chancellor *Malins*.

The bill in *Corrie* v. *Sayers* was filed on the 30th of August, 1873, by Mr. *Corrie* and Mrs. *Corrie* by her next friend, against the trustees and the children. It prayed that the two deeds might be declared void and delivered up to be cancelled, or that the settlement might be rectified by giving Mrs. *Corrie* an absolute

An application to consent to the transfer had been made & refused before the notice of motion was given &c. (post p. 288. n (2))

power of appointment by deed or will over the trust funds; and by providing that in default of appointment the property should go to the survivor of the husband and wife absolutely; and by omitting the covenant to settle after-acquired property of the wife; and by omitting the trust to pay the income to the wife during the joint lives of husband and wife for her separate use without power of anticipation, and substituting a trust to pay it to the husband; and by omitting the power to *Bonnor*, who was a solicitor, to make professional charges; and that *Sayers* and *Bonnor* might be removed from being trustees, and, if necessary, new trustees appointed; and that so far as necessary the trusts of the deeds might be carried into execution under the direction of the Court; and that the trustees might be ordered to pay the costs of the suit.

Mr. *W. D. Rawlins*, for the trustees, moved that the second cause might be transferred to the Court of Vice-Chancellor *Malins*. He referred to *Orrell* v. *Busch* (1) and *Lucas* v. *Siggers* (2).

Mr. *W. W. Karslake*, for the Plaintiffs in the second cause :—

I submit that this is a case to which the general rule does not apply. The great object of the rule is to prevent the snatching decrees, which cannot happen in the present case. The second suit must be disposed of before the first can be heard, and it will be disposed of much sooner at the Rolls, where the arrear of causes is very light, than in the Vice-Chancellor's Court, where it is very heavy.

SIR W. M. JAMES, L.J. :—

I am of opinion that these two suits are sufficiently connected to bring the case within the rule. The proceedings must result in the execution of the trusts of the deed, rectified or unrectified, as the case may be, so that there is a common ground for the two suits. The second suit ought to have been instituted in the same branch of the Court as the first, and the Plaintiffs in it must pay the costs of the application to have it transferred thither. We cannot pay any attention to the amount of the arrears in the Vice-

(1) Law Rep. 5 Ch. 467. (2) Law Rep. 7 Ch. 517.

L. JJ. 1873

SAYERS v. CORRIE.

CORRIE v. SAYERS.

Chancellor's Court; if it becomes very great it will probably be remedied by a transfer of causes to another branch of the Court.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Clarke, Son, & Rawlins;* Mr. *H. H. Hallett.*

L. JJ. 1873

Nov. 22, 25.

In re COUNTY PALATINE LOAN AND DISCOUNT COMPANY.

TEASDALE'S CASE.

Company—Surrender of Shares—Special Resolution altering Articles—Contributory—Companies Act, 1862, *s.* 50.

16 L.D. 622
4 Ch D 331-3, 336
5 Ch D 528
17 Ch D 801
84-9

A company may by special resolution vary its articles so as to give itself power to accept surrenders of old shares in exchange for new.

Two thousand £10 shares in a company had been issued, of which 901 (called X shares) had been fully paid up, and on the other 1099 (called A shares) £2 10s. per share had been paid. Special resolutions were duly passed that the X shares should be cancelled, and two shares of £10 each, with £5 per share paid thereon, given in lieu of each, and that the A shares should be cancelled and one share of £10, with £5 paid, be given in lieu of every two of them. These resolutions were assented to by all the shareholders and duly registered, and the shareholders generally accepted in lieu of their old shares shares (which were called in the proceedings B shares) with £5 each paid. *T.*, a holder of A shares, having thus accepted B shares, sold and transferred them, and in the annual lists sent to the Registrar was treated as having then ceased to be a member. About seven years after the passing of the resolutions the company was ordered to be wound up, and the liquidator placed on the list of contributories the name of *T.*, and also the names of all the other persons who at the passing of the resolutions were holders of A shares, as well as the names of the persons who had become holders of the B shares given in lieu of them:—

Held (affirming the order of the Vice-Chancellor of the County Palatine of *Lancaster*), that *T.*'s name must be removed from the list, for that the resolutions ought to be construed not as purporting to oblige all the shareholders to accept B shares in lieu of their old shares, but only as empowering the directors to effect such exchange with all shareholders who wished it, and that so construed the resolutions were not *ultrà vires*, but were effectual as special resolutions altering the articles of association, and that a surrender of the old shares made in pursuance of them was valid.

THIS was a motion by way of appeal from a decision of the Vice-Chancellor of the County Palatine of *Lancaster*, directing

the name of Mr. *Teasdale* to be omitted from the list of contributories.

The company was registered in 1863 as a limited company with a nominal capital of £100,000, in 10,000 shares, and on its formation took to the business of a former company, a large number of the shareholders in the old company taking corresponding shares in the new company with the same amount paid on them as had been paid on the original shares. At the end of 1863 there were held in the new company 901 fully paid-up £10 shares (called in the proceedings X shares), and 1099 £10 shares, on which £2 10*s.* per share had been paid (called in the proceedings A shares).

At an extraordinary general meeting held on the 28th of February, 1865, the following resolutions were passed:—

"(1). That the present shares of the company on which the sum of £10 each has been paid be cancelled, and that two shares of £10 each with £5 per share paid thereon shall be given in lieu of each share on which the sum of £10 has been paid.

"(2). That the present shares on which the sum of £2 10*s.* each has been called shall be cancelled, and that one share of £10 each with £5 paid thereon shall be given in lieu of two of the before-mentioned shares of £10 on which £2 10*s.* per share has been called.

"(3). That 1650 shares, or the nearest number thereto that may be required to make the before-mentioned shares into 4000, be issued at a premium of not less than £1 10*s.* per share to such persons as the directors think fit."

At a subsequent general meeting held on the 14th of March, 1865, these resolutions were duly confirmed.

It will be observed that as matters stood before the resolutions the total amount that could have been called up from the existing shareholders was £8242 10*s.*, being £7 10*s.* per share on the 1099 shares. Supposing the conversion proposed by the resolutions to be carried into effect the amount would be £11,757 10*s.*, being £5 per share on 1802 shares and 549½ shares, so that the liability of the existing shareholders as a body to future calls was considerably increased, though such liability was differently distributed. The shares of the company were at a premium at this time.

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The first and second of the resolutions were registered with the Registrar of Joint Stock Companies.

The shareholders all assented to the resolutions, and nearly all gave up their old certificates and received new certificates for shares with £5 each paid on them; the holders of X shares receiving certificates for double the original number of their shares, and the holders of A shares certificates for half as many shares as they originally held. The shares thus issued were called B shares.

In pursuance of the third resolution the company issued a number of further shares called C shares, which were taken by the public at £1 10s. premium. Calls were made upon them till £5 per share had been paid up, which took place before October, 1872. In October, 1872, a call of £1 per share was made on all the shares, thus making £6 per share paid up.

The annual list of shareholders sent to the Registrar of Joint Stock Companies proceeded on the footing of the resolutions. The books of the company were kept in the most confused way, and it could not be made out with certainty which document was the register of members.

Teasdale, at the time of the resolutions, was a holder of ten A shares, and five B shares were allotted to him in lieu of them. In 1865 he sold the shares so allotted, and regularly transferred them to the purchaser, and thereupon gave up to the manager of the company the certificates for his A shares. From that time he never received any notice from the company. In the yearly list sent to the Registrar of Joint Stock Companies for February, 1865, he was entered as a shareholder; but in that for 1866 he was entered as having transferred his shares during the past year, and in the subsequent lists his name did not appear at all.

An order having been made after October, 1872, for winding up the company, the liquidator placed *Teasdale* on the list of contributories for ten A shares, and similarly placed on the list all the other persons who were holders of A shares at the time of the resolutions. He also placed on the list all the persons who at the time of the winding-up were holders of B shares.

Teasdale, whose case was taken as a representative case, applied

to have his name taken off the list, and the Vice-Chancellor ordered accordingly. The liquidator appealed.

Mr. *Higgins*, Q.C., and Mr. *North*, for the Appellant:—

We contend that the resolution cancelling the shares on which £2 10*s.* only had been paid, and substituting for them half the number of shares on which £5 per share was taken to be paid was invalid, as affecting the rights of creditors by lessening the amount raiseable by means of calls. The lapse of time will not confirm the transaction if originally invalid: *Addison's Case* (1). The Vice-Chancellor relied on *Feiling and Rimington's Case* (2); but there the conversion did not affect the amount to be called up on the shares. The shareholders *inter se* might be bound by acquiescence, but the rights of creditors could not be affected.

Mr. *Jackson*, Q.C., and Mr. *Robinson*, for *Teasdale*:—

There is nothing illegal in the surrendering shares to the company where it is authorized by the articles: *Snell's Case* (3); *Thomas's Case* (4); *Campbell's Case* (5). Now these resolutions were passed and registered as special resolutions for altering the articles, and the surrender of the old shares under them was therefore effectual. The liquidator must take the resolutions together; they are parts of one arrangement. He cannot both approbate and reprobate, and the arrangement on the whole increases the assets. According to his argument, if *Teasdale* had not sold the five new shares, he would have been on the list of contributories, both for them and his ten original shares.

Mr. *North*, in reply:—

The directors may release a shareholder from liability if he gives them a consideration for it; but I submit that they cannot release him, because somebody else contemporaneously gives a benefit to the company, and that is what the Appellant is contending for here.

(1) Law Rep. 5 Ch. 294.
(2) Ibid. 2 Ch. 714.
(3) Law Rep. 5 Ch. 22.
(4) Ibid. 13 Eq. 437.
(5) *Ante*, p. 1.

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SIR W. M. JAMES, L.J. :—

I am of opinion that the decision of the Vice-Chancellor ought to be affirmed. The liquidator seeks to put on the list of contributories a gentleman who has been off the register for many years, and who has been off it by virtue of resolutions which were intended to take effect by way of alteration of the articles of association, having been passed in the manner required by law for altering the articles, and duly sent up to the registrar accordingly. There was, by the articles as they stood after this alteration, a power in the directors to deal with two sets of shares in different ways. One set consisted of shares fully paid up, the other of shares on which £2 10*s.* only had been paid up. The holders of the first set were minded to have instead of them double the number of shares with £5 per share paid up. The holders of the other set were minded to have half the number of shares with £5 per share paid up. There is nothing in point of law to prevent such resolutions from being passed and carried into effect if they are passed honestly and *bonâ fide*, not with a view to enable one set of shareholders to escape liability, nor with any other fraudulent or improper view. There is no doubt that a company may give itself power to purchase its own shares, to take surrenders of shares, and to cancel the certificates of shares. It is said that the second resolution diminishes the capital, and in some sense it does, but only in the same sense in which the capital is diminished when a company buys its own shares. And, as Mr. *Jackson* justly observed, the persons whose shares are surrendered to the company, or bought by the company, remain liable for a year as past shareholders. The amount of capital raiseable on the two sets of shares taken together was materially increased by the arrangement, so that the creditors of the company appear to have been benefited by it. Under these circumstances, unless we can find that there has been a violation of the law in what has been done, the transaction must stand. We cannot introduce a new principle of law in order to benefit the creditors of the company. If we give the resolutions a fair construction, not as intended to effect a compulsory conversion of the shares of all the shareholders, but as giving the directors power to convert the shares of those shareholders who wished it, the case comes quite within the principle of

Campbell's Case (1). *Teasdale* accepted shares in exchange for his old shares, according to the resolutions. He sold and transferred to the purchasers some years ago the shares which he received, and in my opinion he is free. I am well satisfied to find that a *bonâ fide* transaction which took place so long ago can be supported.

SIR G. MELLISH, L.J.:—

I am of the same opinion. *Snell's Case* (2) and *Campbell's Case* are direct authorities that where the articles authorize the surrender of shares, such a surrender is valid if made *bonâ fide,* and with a view to the benefit of the company. Then was a surrender authorized by the articles? The articles originally contained no such provision, and the question turns upon this, whether the resolutions effectually altered the articles so as to give such authority. If the resolutions were to be construed literally, as by their own force converting the shares without the consent of the holders, then I think they would be *ultrà vires,* and void. But, like all other documents, they ought to be construed reasonably, *ut res magis valeat quam pereat,* and they ought, I think, to be construed as only intended to give power to the directors to accept surrenders of old shares, and issue new shares in their stead. An article to that effect would have been valid. *Teasdale* acted on the resolutions, gave up the certificates of his old shares, got new shares, and transferred those new shares. I think that thereupon he ceased to be a member of the company. It is said that he was kept on the register of shareholders. If that was so—and the books of the company are in such confusion that it is hard to say whether it was so or not—he was kept there merely through a blunder on the part of the company. It is clear that the company never meant to hold him out as a member, and it is certain that he never assented to being held out as such. His position cannot be altered by the careless way in which the register was kept.

Solicitors: Mr. *Wynne,* for *A. S. Mather, Liverpool;* Messrs. *Sharpe, Parkers, & Co.,* for Messrs. *Harvey & Alsop, Liverpool.*

(1) *Ante,* p. 1. (2) Law Rep. 5 Ch. 22.

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Nov. 19, 20.

In re MATLOCK OLD BATH HYDROPATHIC COMPANY.

MAYNARD'S CASE.

Contributory—Subscriber of Memorandum—Fully paid-up Shares—Payment—Set-off.

17 L. T. 174
9 L. R. Eq. 356
555
6 Ch. D. 683.
12 Ch. D. 883.
14 Ch. D. 437

M. subscribed the memorandum of a company in November, 1865, for 100 £10 shares, and became a director and chairman. The 100 shares were registered in his name before March, 1866. On the 1st of March 1866, he signed a written agreement to sell certain land to the company for £1000, and he afterwards conveyed it to the company, signing the usual receipt for the purchase-money. It did not appear that any money was ever paid to him, but his shares were treated as fully paid up. At a meeting of the company on the 28th of March, 1866, the directors stated that they had bought property on advantageous terms, the vendors having agreed to accept £1000, part of the purchase-money, in fully paid-up shares. Some time after the agreement had been entered into, a minute was made in the directors' minute book stating that 100 paid-up shares had been allotted to *M.* in payment of his purchase-money. No shares, however, were in fact allotted to him. The prospectus contained a statement similar to that in the report. The company having afterwards been ordered to be wound up, *M.* was found on the register for 100 paid-up shares, but the official liquidator applied to put him on the list of contributories for 100 other shares on which nothing had been paid. *M.*, in his affidavits, stated that he had, during the negotiation for purchase, offered to accept the £1000 in paid-up shares or to invest it in paid-up shares, and that on the completion of the purchase 100 paid-up shares were allotted to him and received by him in satisfaction of the £1000:—

Held (reversing the decison of *Bacon*, V.C.), that *M.* was to be treated only as the holder of fully paid-up shares, for that on the terms of the contract and conveyance the company were bound to pay him £1000 in cash, and that by this his liability on the 100 shares for which he signed the memorandum of association was satisfied, and that the expressions in the prospectus, the report, the directors' minute, and *M.'s* affidavits, were not sufficient to lead to the conclusion that *M.* sold to the company for 100 fully paid-up shares distinct from the shares for which he signed the memorandum.

THIS was an appeal by Mr. *Maynard* from a decision of Vice-Chancellor *Bacon* placing him on the list of contributories for 100 shares on which nothing had been paid, in addition to 110 fully paid up shares.

The company was registered on the 29th of November, 1865,

as a company limited by shares. The nominal capital was £25,000 in 2500 shares of £10 each. The Appellant subscribed the memorandum of association for 100 shares, was named, in the articles of association, one of the first directors, and became chairman of the company. These 100 shares appeared to have been registered in his name some time before March, 1866. The articles provided that at the first general meeting all the directors should retire, but should be eligible for re-election. The holding twenty shares was the qualification for being a director. The first general meeting took place on the 28th of March, 1866. The Appellant acted as chairman at that meeting, and was re-elected a director.

The object of the company was to set up a hydropathic establishment on the site of the *Old Bath Hotel* at *Matlock*. This site belonged, as to part, to the Appellant and Messrs. *Crompton, Hallewell,* and *Wigram,* in undivided shares, and, as to the rest, to the Appellant solely, and the company were put in possession in November, 1865. The Appellant stated in one of his affidavits as follows:—"Prior to the 10th of May, 1865, Messrs. *Crompton, Hallewell,* and *Wigram,* and I had proposed to sell the property to the company for £4500, I offering to accept paid-up shares in the company to the extent of £1000 in payment for that portion of the purchase-money which belonged exclusively to me, or to invest £1000, part of the purchase-money, in paid-up shares of the company; and at a meeting of the persons who were intended to be the first directors of the company when formed, held on the 10th of May, 1865, it was resolved that the necessary steps should be taken to incorporate the company, and that the secretary should be and he was thereby authorized to enter into a contract for and in the name of the company for the purchase of the *Old Bath Hotel* property for £4500, on the understanding that the vendors agree to invest £1000, part of the purchase-money, in paid-up shares of the company."

No agreement for purchase was signed till the 1st of March, 1866, when two contracts were entered into, one being for the sale to the company at the price of £3500 of that part of the property in which the Appellant had only an undivided share—the other relating to that of which he was sole owner. The latter was a contract for sale to the company at the price of £1000, with the

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usual provision for payment of interest if the purchase-money was not paid on the day named for completion. The Appellant, by his affidavit, stated: "Though it is not so expressed in the agreement, there was a verbal understanding between me and the company that I would invest the said £1000 in paid-up shares of the company, as referred to in the said resolutions of the 10th of May, 1865, or accept the purchase-money in paid-up shares."

The prospectus, the date of which did not appear, stated that "The directors have made a satisfactory arrangement for the purchase of the well-known *Old Bath Hotel*, together with the premises and pleasure-grounds belonging thereto, the vendor taking £1000 of the purchase-money in paid-up shares."

The report presented to the meeting of the 28th of March, 1866, stated that "The directors have purchased the *Old Bath Hotel* property for £4500, on advantageous terms. The vendors have agreed to accept £1000, part of the purchase-money, in paid-up shares of the company, and to take a mortgage on the land for the balance, £3500, at £4 10*s.* per cent. per annum."

In a minute of the proceedings of the directors of the same date, it was stated that 100 fully paid-up shares had been issued to the Appellant in part payment of his purchase-money. No such allotment, however, was made.

Some time afterwards in the same year *Maynard* executed a conveyance to the company, giving the usual receipt for the purchase-money. No fresh shares were allotted to him, but he remained on the register for his original shares, which appeared to have been treated as fully paid-up. In April, 1867, ten other shares were allotted to him, and he paid up in cash all the calls on them. He never was placed on the register in respect of any further shares. He stated in one of his affidavits as follows:— "The said sum of £1000 was not, nor was any part thereof, ever in fact paid to me, but on the completion of the purchase 100 paid-up shares in the company of £10 each were allotted to me, and I accepted the same as £1000 money's worth in payment and satisfaction of the purchase-money for the said property, of which I was sole owner as aforesaid, and in fulfilment of the understanding that I would invest £1000, part of the purchase-money, in fully paid-up shares of the company."

No trace appeared of the Appellant ever having received any cash on account of his £1000 purchase-money.

The company having been ordered to be wound up, the official liquidator applied to put the Appellant's name on the list of contributories for the 100 shares in respect of which he subscribed the memorandum in addition to the 110 shares for which he was on the register, and which were admitted to be fully paid-up shares. Vice-Chancellor *Bacon* decided in favour of the contention of the official liquidator (1).

(1) 1873. July 24. W.N. 73/180

SIR JAMES BACON, V.C., after stating the facts, and referring to the above extracts from Mr. *Maynard*'s affidavits, continued :—

That is the whole material evidence in this case; and in the written evidence, in which, if the arrangement spoken of by Mr. *Maynard* in his last affidavit had ever been come to, there ought to have been some mention of it, I find a total blank, and an entire absence of any statement of fact from which I can properly draw any conclusion that such arrangement existed. On the other hand, I find the facts plain; the memorandum of association is signed, and for months after that this gentleman, being a director of the company—upon which I lay no greater stress than the case positively requires me to do—he, as a director interfering with the management of the company, carries on the operations of the company from November, 1865, to March, 1866, without any suggestion that he was not the absolute owner of the 100 shares which had been his from the time he signed the memorandum; and against creditors who are asking to be paid by the shareholders in this company, am I to say that by this transaction, evidenced by such documents as I have referred to, this gentleman has acquitted himself of his obligation? He is a holder of 110 paid-up shares; beyond all doubt, he is no less the holder of 100 shares which he contracted to take by signing the memorandum of association, and to hold otherwise would be to deny the plain facts of the case. It is not necessary to go into the various authorities which have been referred to. The circumstances which have given rise to the decisions that have been referred to have often been very embarrassing, and the particulars on which the judgment is founded sometimes very minute; but in no case has the Court departed from that wholesome principle, that where the transactions of the parties are recorded in written documents you must rely on the written documents, and you must not rely on any suggestion of an understanding confirmed and corroborated by what has been done between the parties. Now what corroboration is there? I have observed on the absence of the mention of any material fact in the written documents. What corroboration is there of any part of this case? What is there inconsistent with the fact that after November, 1865, the 100 shares of which Mr. *Maynard* was the owner were his for all purposes, and might have been sold and dealt with by him, and were his property to all intents and purposes? There was no agreement binding anybody that he would sell for £1000, or any other sum, his interest in that divided part of the property which is mentioned. If he

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Mr. *Amphlett*, Q.C., and Mr. *Graham Hastings*, for the Appellant.

Mr. *Kay*, Q.C., and Mr. *Ince*, for the Respondent.

The following cases were referred to: *Migotti's Case* (1); *Drummond's Case* (2); *Pell's Case* (3); *Forbes and Judd's Case* (4); *In re Baglan Hall Colliery* (5); *Jones's Case* (6); *Fothergill's Case* (7); *Spargo's Case* (8); *Black & Co.'s Case* (9).]

LORD SELBORNE, L.C.:—

The question in this case is one of payment or no payment, the liability of the Appellant to pay up to the company the full amount of the shares for which he subscribed the memorandum of associa-

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had died, the company had no means of enforcing the performance of the undertaking or agreement which is referred to. His heir-at-law or devisee would not have been bound to sell for £1000 if the shares in this company had increased greatly in value, as they might have done. He would not have been obliged to take the burthen on himself, if it was a burthen. If it was a benefit, he might have claimed it; but he was under no sort of obligation between November and March to do anything with this company in respect of the sale of his land when he did, in the very words which he himself uses on the completion of the purchase, have 100 shares allotted to him, and took them as paid-up shares. *Fothergill's Case* (Law Rep. 8 Ch. 270), which has been referred to, is a very valuable decision in my opinion, as it has established the principle on which alone the Court can safely act. The Lord Chancellor, although he considered it to be his duty to examine the other cases, so far as they had any application to that which was before the Court, relied wholly and entirely on the written testimony or the documentary evidence which was before him, and excluded from consideration—as in my opinion, if I may say so with deference, there ought to be excluded from consideration here—all that was said about the intention of the parties. I can collect no intention from what has been done by the parties, except the intention which the documentary evidence plainly expresses; and in my opinion, by signing the memorandum of association, Mr. *Maynard* became and is the holder of 100 shares not paid up, and is under all the liabilities and obligations which attach, under the *Companies Act*, to the holder of such shares in a joint stock company.

(1) Law Rep. 4 Eq. 238.
(2) Ibid. 4 Ch. 772.
(3) Ibid. 5 Ch. 11.
(4) Ibid. 5 Ch. 270.
(5) Ibid. 5 Ch. 346.
(6) Ibid. 6 Ch. 48.
(7) Ibid. 8 Ch. 270.
(8) Ibid. 8 Ch. 407.
(9) Ibid. 8 Ch. 254.

tion being unquestionable, and the company having been free to accept the payment in any honest way. If the contract for the sale of the Appellant's property to the company, dated the 1st of March, 1866, and the conveyance consequent thereon, expressed the true agreement between the parties, the company became bound to pay the Appellant £1000, the same sum which he was liable to pay them for the shares in question, and there was no difficulty in point of law in setting off one payment against the other; which, from the evidence before us, we are satisfied was the thing intended to be done, and actually done, so far as the parties could do it. Whatever difficulty there is in the case arises from the statement in the prospectus, which I assume to have been issued after the registration of the memorandum of association, to the effect that the company had made a satisfactory arrangement for the purchase of the Appellant's property, the vendor taking £1000 of the purchase-money in paid-up shares of the company; and from the facts that the Appellant, who was the chairman and a director of the company, must be taken to have authorized the statement, and that the company was, from the commencement of its legal existence in November, 1865, in possession of this property upon the terms, as must be supposed, of some parol agreement for its purchase. It further appears that some months before the formation of this company its promoters had authorized their secretary to negotiate for the purchase of this property, on the understanding that the £1000 in question, which was to be part of the entire purchase-money, should be invested by the vendor in paid-up shares of the company; that a report was made by the directors to the shareholders on the 28th of March, 1866, stating that the vendor had agreed to accept £1000, part of the purchase-money, in paid-up shares of the company; and that in a board minute of the same date it is stated that 100 paid-up shares had been issued to the Appellant in part payment of the purchase-money. The Vice-Chancellor seems to have regarded this minute, and some passages in the Appellant's evidence, as sufficient proof that he did in fact receive, in payment for the land, paid-up shares not identified with the shares for which he signed the memorandum. But in this view of the facts we cannot agree. It seems to us clear that no paid-up shares were ever allotted to or

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registered in the name of the Appellant in addition to the shares now in question, which appear to have been registered some time before March, 1866. The question, to my mind, is, whether this evidence obliges or entitles us to disregard the terms of the written contract of the 1st of March, 1866, and the subsequent conveyance, and to hold that the Appellant was never, after he subscribed the memorandum of association, a creditor of the company for £1000, but only a creditor for 100 paid-up shares in the company. If that were the proper conclusion, I should myself agree with the Vice-Chancellor, and should not, as at present advised, be able to hold that the shares for which the Appellant subscribed the memorandum were, or could be, paid up by setting off against them the right which, upon that supposition, he would have had against the company to call for the allotment or issue to him of 100 other fully paid-up shares. He was the chairman of the company, and the directors, as I understand, had no power to invest any part of the funds of the company in the purchase of its own shares. But I do not think we are either obliged or entitled so to deal with the written agreements, which, as far as appears, were entered into in perfect good faith, and which cannot, in my opinion, be controlled by the prospectus, or the report, or the board minute to which I have referred. It may have been the true meaning, although, in my judgment, it is not aptly or accurately expressed, alike of the prospectus, the report, and the minute, that the Appellant, as vendor to the company, would not require the £1000 to be paid to him in money, but would be content to have it applied in paying up his shares, or—to use the expression of the promoters, in the authority given by them to their secretary the year before—that he would so invest the £1000. This operation, though not equally advantageous to the company as if they had obtained the right to require from the Appellant, as a shareholder, payment of the full sum of £1000 in cash, and also the right to his land without any money payment on the delivery to him, as vendor, of a certificate for 100 paid-up shares in the company, was nevertheless beneficial to them, as it relieved them from the necessity of paying down £1000 in money out of the previously paid-up funds of the company. The proper conclusion of fact from the whole evidence, notwithstanding

some inaccuracies of language in the Appellant's affidavits, corresponding with similar inaccuracies in the documents referred to, seems to me to be, that this, and this only was the operation throughout intended, and that, as suggested by Mr. *Amphlett*, when an allotment of paid-up shares was spoken of in the board minute of the 28th of March, 1866, nothing more was meant than that the Appellant had his right recognised to the issue of certificates shewing that the 100 shares registered in his name were, in March, 1866, fully paid up by setting-off against the amount due on them the purchase-money for the land. Consistently, therefore, with all that was decided or said in *Fothergill's Case* (1), I think that the Appellant ought not to be on the list for these 100 shares otherwise than as fully paid-up shares.

SIR W. M. JAMES, L.J.:—

I am of the same opinion. It appeared to me almost from the first, with deference to the view of the Vice-Chancellor, that really this was a plain case on the documents themselves. The Appellant was, beyond all question, liable to pay for 100 shares, and, beyond all question, he did, by a written agreement—the only binding agreement between him and the company—and by a conveyance, sell his land partly for £1000. That £1000 was applied by him in payment of the shares which he so contracted to take. It appears to me, that being so, unless in some proper proceeding based on proper materials that agreement and that conveyance are set aside or rectified, it is impossible to raise such an equity as is suggested here by way of equitable replication or answer to the plea of payment. If, indeed, the case could be brought up to this, that the whole transaction was a sham and a fraud from the beginning—a mere contrivance to enable the chairman to pay up £1000 for his shares—that would be a different thing; but if the case is rested upon a refined equity arising upon a right to have the documents actually signed by the parties modified or rectified, by reason of something said or done, or by reason of something stated in some other document, then I am of opinion that such a case is not capable of being raised on the trial of an issue whether the money was paid or not.

(1) Law Rep. 8 Ch. 270.

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MAYNARD'S CASE.

SIR G. MELLISH, L.J.:—

I am of the same opinion. Upon the written documents, if we look at them alone, the case is clear enough. By signing the memorandum of association the Appellant became the holder of 100 shares not paid up. By a written agreement he sold land to the company for £1000, and he conveyed that land to the company and signed a receipt acknowledging he had received the £1000. It is quite plain (and that is not disputed) that that £1000 was never paid. The only £1000 to which it can be referred is the £1000 which he owed on his shares. If it stood there, the matter is quite plain. But the Vice-Chancellor came to the conclusion, principally from expressions in the Appellant's own affidavits, that in reality 100 additional paid-up shares were allotted to him at the time when the conveyance was executed, and that in reality, although he signed the receipt admitting that he had received £1000 in money, what he really had received was 100 additional paid-up shares. Now there is certainly no evidence in the books of the directors of any allotment of such additional 100 shares, neither is he registered for the additional 100 shares, but he is only registered for the original 100 shares in respect of which he signed the memorandum. I cannot help coming to the conclusion that the expressions in his affidavit are merely inaccurate expressions which it is very likely that persons might fall into from not seeing the exact legal effect of signing the memorandum. In my opinion the burthen of proof is clearly on the official liquidator to shew that there were really allotted to the Appellant, and that he did accept, 100 additional shares besides those in the memorandum. Looking at that, I think before the official liquidator can rely on what may very probably be inaccurate expressions in the Appellant's affidavit, he should have cross-examined him, and have said, "Did you really mean by this to say that you got 100 additional paid-up shares? How do you account for these shares in the memorandum?" If that had been done, I have not the least doubt that he would have explained, and would have said, "I considered that they were all the same shares, and that there was no additional allotment at all." I entirely agree with the judgments that have been given.

Solicitors: Messrs. *Satchell & Chapple*; Messrs. *White & Sons.*

ELMER *v.* CREASY.

[1873 E. 19.]

L. C. and L. JJ.
1873
Nov. 18, 25.

Answer—Mortgagee—Redemption Suit—Accounts.

A Defendant in a redemption suit, who admits that the Plaintiff is entitled to a decree, cannot refuse to set out in his answer his accounts as mortgagee. The rule as to answering applicable to redemption suits is the same as for any other suits for accounts.

Order of *Malins*, V.C., affirmed.

THE bill in this case was filed by *Robert Elmer*, as heir-at-law to his father, *William Elmer*, and stated that, by an indenture dated in or about the year 1844, and made between *William Elmer* and *John Creasy*, *William Elmer* conveyed to *John Creasy* a piece of land at *Upwell*, subject to redemption on payment of £1800 and interest. That *William Elmer* died in 1853 intestate; and that shortly afterwards *J. Creasy* went into the receipt of the rents and profits as mortgagee, and continued so. That the rents and profits were far more than sufficient to keep down the interest, and that the principal sum was very much reduced. That *Creasy* refused to state what was then due to him as mortgagee. And the bill prayed for an account with rests, and that, on payment of what was due, the Defendant *Creasy* might be ordered to reconvey.

The Plaintiff filed interrogatories, one of which asked that the Defendant might set forth a full, true, and particular account of all rents and profits of the mortgaged hereditaments received by him, or come to his hands or to the hands of any person or persons by his order or for his use; specifying the dates when, and the persons from whom, and the times at which, he had received the same and every part thereof, and how and in what manner he had applied each and every part thereof.

The Defendant, by his answer, stated that the principal money had not been reduced by the surplus rents, and submitted that it would be premature to set forth the accounts in the answer, and that he was not bound to do so. That the Plaintiff had never, except by his bill, offered to redeem; and that the Defendant had

L. C. and L. JJ. 1873 ELMER v. CREASY.

never refused to render an account, or to state the amount claimed by him in respect of the said mortgage debt.

The Plaintiff excepted to this answer for insufficiency, in not having answered the interrogatory as to the accounts. The Vice-Chancellor *Malins* allowed the exceptions.(a)

The Defendant appealed.

Mr. *Hemming*, in support of the appeal:—

There is no authority that a mortgagee is bound, in his answer to a bill for redemption, to set out his accounts. The Defendant submits to a decree, and will then account, which is all that can be required. No discovery which these accounts would give could be of any use to the Plaintiff, and the Defendant ought not to be required to go to all this expense and trouble. It might, and often would, lead to great vexation and oppression, as redemption suits are frequently instituted by paupers. No doubt a trustee or executor must set out his accounts in his answer, but he is in a fiduciary position, which a mortgagee is not.

Mr. *Ince*, for the Plaintiff:—

The fact that the accounts will be taken under the decree is no reason why the Defendant should not set them out in his answer: *White* v. *Williams* (1). This is a redemption suit, and the Plaintiff will have to pay for the answer which he requires. He has a right to know the state of the accounts, so as to be able to determine whether he will go on with the suit: *Brookes* v. *Boucher* (2); and whether he can make out a case for an account with rests, for which at present he has no materials: *Donovan* v. *Fricker* (3); *Quarrell* v. *Beckford* (4). The Defendant does not even state how much he claims as due to him: *Carver* v. *Pinto Leite* (5). *De La Rue* v. *Dickinson* (6) does not apply.

Mr. *Hemming*, in reply:—

It is now admitted that the Plaintiff is only fishing for information, and wants to see whether he cannot file a better bill. The

(1) 8 Ves. 193.
(2) 8 Jur. (N.S.) 639.
(3) Jac. 165.
(4) 1 Madd. 269.
(5) Law Rep. 7 Ch. 90.
(6) 3 K. & J. 388.

(a) See W.N. (1873) 150

Court will not encourage such a practice, which may be used as a means of extorting money by threatening to put the Defendant to the expense of making out an account which necessarily extends over many years.

Nov. 25. LORD SELBORNE, L.C., now delivered the judgment of the Court:—

The question in this case is whether a mortgagee in possession, Defendant to a bill for redemption, admitting himself to be redeemable, can wholly decline answering interrogatories as to the state and particulars of the account which it is one of the objects of the suit to take.

We find no authority, and we see no reason, for treating a redemption suit as subject to any different rule in this respect from that applicable to a suit for any other kind of accounts necessary for or consequential upon the principal relief prayed.

The question whether, before the abolition of the Masters' offices, (when exceptions to answers for insufficiency were heard, in the first instance, by the Masters and not by the Court), a Defendant to an ordinary suit for such accounts could by answer protect himself from discovery as to the particulars of the accounts prayed, is discussed by Sir *James Wigram*, in sections 159 to 185 of his work on Discovery, and by Mr. *Hare*, in part iv. chap. i. of his work on the same subject, with the usual ability of those writers. The result is that (although, during the interval between Lord *Kenyon's* appointment as Master of the Rolls and the accession of Lord *Eldon* to the Chancellorship, a different practice was followed in certain cases, of which *Jacobs* v. *Goodman* (1) and *Marquis of Donnegal* v. *Stewart* (2) are examples), the true rule, as finally settled by Lord *Eldon* and his successors, was, that a Defendant, submitting to answer (even when he altogether denied the Plaintiff's title), was obliged to answer fully, not only as to other matters, but also as to consequential matters of account.

The principle expressed in Sir *James Wigram's* first proposition (3), that "the right of a Plaintiff to discovery is in all cases

(1) 3 Bro. C. C. 487, n. (2) 3 Ves. 446.
(3) *Wigram* on Discovery, sect. 25.

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confined to the question or questions in the cause, which, according to the pleadings and practice of the Courts, is or are about to come on for trial," might indeed have seemed to justify the postponement, until after the decree, of all discovery as to items of account, concerning which no special relief was prayed; especially if Lord *Gifford* was right in refusing (as he did in *Law* v. *Hunter* (1) and *Walker* v. *Woodward* (2)) to receive at the hearing, or to enter in the decree as read, evidence as to such items.

It must also be admitted that much unnecessary delay and expense might (and probably did, in many cases,) result from the rule that discovery as to such matters could be limited only by demurrer or plea. The rule, however, was in fact established, both on technical grounds (which may perhaps have lost some of their force since the removal of the hearing of exceptions for insufficiency from the Masters to the Court), and also because a full discovery of the details of the account might in some cases enable a Plaintiff to take an immediate and final decree at the hearing, for what, on the Defendant's own statement, might appear to be due to him; and because, if this part of the discovery were postponed till a later stage, the Plaintiff might run the risk of losing it altogether, by death or other intervening accidents.

In the Court of Exchequer, when that Court exercised Equity jurisdiction, exceptions to answers for insufficiency always came immediately before the Court itself; and a larger degree of discretion as to the allowance or disallowance of those exceptions, according to the view which the Court might take of their materiality to the issues to be determined at the hearing in each particular case, prevailed. After the passing of the Act for the abolition of the Masters' Offices, efforts were very soon made to obtain in this Court the benefit of a limitation of the Plaintiff's right to discovery by answer, such as had prevailed on the Equity side of the Court of Exchequer, and such as had recommended itself to the minds of Lord *Kenyon* and Lord *Loughborough*. In *Swinborne* v. *Nelson* (3) and *Clegg* v. *Edmonson* (4), in both which cases I was counsel, this experiment was unsuccessfully made before the late Master of the Rolls; nor is it correct to say, that those deci-

(1) 1 Russ. 100.
(2) Ibid. 107.
(3) 16 Beav. 416.
(4) 22 Ibid. 125.

sions of Lord *Romilly* were ever reversed or overruled by the Court of Appeal. What really happened in the Court of Appeal was, that the Lords Justices succeeded in putting pressure upon the parties, so as to obtain their consent to reasonable terms for expediting the hearing, including such admissions for the purposes of that hearing, as their Lordships thought sufficient; and upon those terms, the exceptions, or the appeals from the orders allowing them (I am not sure which, for these cases upon appeal are not reported), were ordered to stand over till the hearing. Vice-Chancellor *Wood*, in *De La Rue* v. *Dickinson* (1) (an exactly similar case to *Swinborne* v. *Nelson* (2)), thought himself warranted by those precedents in making an adverse order, that exceptions for insufficiency should stand over to the hearing.

It is manifest, however, that the question of sufficiency or insufficiency was by that mode of dealing with it evaded, and not determined. In all those cases the Defendant by his answer had wholly denied the Plaintiff's title to relief. They furnish in any view of them, no authority for the claim of a Defendant who admits (as the Defendant here does) the Plaintiff's right to relief, to refuse all discovery before the hearing as to consequential matters of account.

In the case before us, the Plaintiff asks by the prayer of his bill that the account against the Defendant, the mortgagee, may be taken with rests. He has not indeed alleged in his bill any circumstance entitling him by the course of the Court to that particular relief. But if the course of the Court entitles him in this stage of the suit to discovery as to the state of the account, it would be premature for us to assume that he may not by means of such discovery (and by amendment, if necessary, of his bill) be enabled to present to the Court at the hearing a case requiring consideration in support of that part of the prayer.

We are not now called upon to determine whether the Defendant must, in answer to these interrogatories, set forth as full and detailed a statement of all the items of the account as he might be obliged to give under a decree for redemption. The Court may be trusted to exercise a proper control over any attempt on the Plaintiff's part to press for any such minuteness of discovery as

(1) 3 K. & J. 388. (2) 16 Beav. 416.

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would be either vexatious or unreasonable, as indeed it can do in every case in which it is satisfied that any kind of discovery is required vexatiously or oppressively: *Reade* v. *Woodrooffe* (1). But the present question is, whether the Defendant is entitled to refuse to answer at all before decree as to these matters? The Vice-Chancellor has decided that he is not, and with that decision we agree. The appeal must be dismissed with costs.

6 Ch D 517

Solicitor for the Plaintiff: Mr. *T. M. Wilkin.*
Solicitors for the Defendant: Messrs. *Hensman & Nicholson.*

L. C. and L. J. M. 1873 *Dec.* 5, 19.

In re O'REARDON.

Joint Bankruptcy—Separate Bankruptcies—Distribution of Assets—Irish Bankruptcy.

14 Ch D 718 722

One of two partners was adjudicated bankrupt in *England*, and the other in *Ireland*; they were then jointly adjudicated bankrupts in *Ireland*. Most of the joint creditors were in *England*, and a considerable part of the assets was in *England*:—

Held, that the assets in *England* would not be handed over to the assignees in the joint bankruptcy.

The effect of a joint adjudication after separate adjudications, discussed.

IN this case *Daniel O'Reardon*, in *England*, and *Maria Murphy*, in *Ireland*, had carried on business in partnership. *O'Reardon* assigned his property to trustees in *England*, and was afterwards adjudicated a bankrupt in *England*. *Maria Murphy* was adjudicated bankrupt in *Ireland*, and then they were jointly adjudicated bankrupts in *Ireland*, the same persons being appointed assignees as were assignees under *Maria Murphy's* bankruptcy. The assignees in *Ireland* applied to the Court of Bankruptcy in *England* to have certain money in *England* belonging to the joint estate remitted to them in *Ireland*. The Registrar in Bankruptcy refused to make the order, and the assignees in *Ireland* appealed.

The facts of the case are fully stated in the judgment below.

Mr. *Winslow*, in support of the application, contended that when

(1) 24 Beav. 421.

there was a joint bankruptcy, the assets ought to be distributed under it. He cited *Ex parte Pemberton* (1); *Ex parte Rawson* (2); *Ex parte Digby* (3); *Ex parte Cridland* (4). Moreover, the balance of convenience was in favour of distribution in *Ireland*.

Mr. *De Gex*, Q.C., and Mr. *Warmington*, for the trustees of the deed of assignment, cited *Barker* v. *Goodair* (5); *Ex parte Crew* (6); *Ex parte Brown* (7).

Mr. *Henriques*, for the trustee under *O'Reardon's* bankruptcy.

Mr. *Gill*, for other parties.

Mr. *Winslow*, in reply:—

It would be very inconvenient for the assignee of one partner to distribute the assets amongst the joint creditors. The joint bankruptcy ought to prevail, and the prior bankruptcy does not interfere with it: *Morgan* v. *Knight* (8).

Dec. 19. SIR G. MELLISH, L.J.:—

This was an appeal from an order of Mr. Registrar *Brougham*, by which he refused an application of the assignees of *Daniel O'Reardon* and *Maria Murphy*, under an adjudication by the Court of Bankruptcy in *Ireland*, that it might be declared that a sum of £4227 9*s*., deposited in the *London and Westminster Bank* in the names of *Samuel Bevington*, *Michael Dixon*, *James Pudney*, and *Samuel Burrows*, in pursuance of an order of the *London* Court of Bankruptcy dated the 25th of February, 1873, and being the proceeds of the sale of certain goods by Messrs. *Bevington & Morris* referred to in the said order, forms part of the estate of *Daniel O'Reardon* and *Maria Murphy*; and that all necessary persons might be directed to pay such sum to the applicants.

Daniel O'Reardon and *Maria Murphy* carried on business as hide and skin merchants in *England* and *Ireland*; *O'Reardon* managing

(1) 1 M. D. & D. 190.
(2) 1 V. & B. 160.
(3) 1 Dea. 341.
(4) 2 Rose, 164.
(5) 11 Ves. 78.
(6) 16 Ves. 236.
(7) 1 V. & B. 60.
(8) 15 C. B. (N.S.) 669.

L. C. and L. J. M. 1873 *In re* O'Reardon.

the business in *London*, and Mrs. *Murphy* in *Dublin*. In November, 1872, *O'Reardon* committed an act of bankruptcy by executing an assignment of all his estate and effects to *Michael Dixon* and *James Pudney*, to be equally divided amongst all his creditors.

On the 22nd of November, a petition was presented against him in the *London* Court of Bankruptcy, and on the 20th of December he was there adjudicated a bankrupt. *Samuel Burrows* was appointed trustee. Messrs. *Bevington & Morris*, auctioneers, sold a large quantity of skins belonging to the firm, under the orders of the trustees of the deed, for the benefit of creditors, and realized therefrom the sum of £4227 9*s*.; and on the 25th day of February, 1873, the Court, on their application asking that the Court would determine to whom the said sum should be paid, made an order that this sum should be placed to a deposit account in the *London and Westminster*, in the names of the above-named *Samuel Bevington*, *Michael Dixon*, *James Pudney*, and *Samuel Burrows*. *Dixon* and *Pudney*, the trustees of the deed of assignment, were not parties to this order, but they had notice given to them that the money was placed in their names jointly with others. Mrs. *Murphy* was served with notice of the application, but did not appear. On the 1st of February, 1873, Mrs. *Murphy* was adjudicated a bankrupt in *Ireland*, and the Appellants were appointed her assignees.

O'Reardon went over to *Ireland*, and on the 10th of February *O'Reardon & Murphy* were jointly adjudicated bankrupts in *Ireland*, and the Appellants were appointed assignees of the joint estate also.

The question we have to determine is, whether the £4227 9*s*., which are unquestionably joint assets of *O'Reardon & Murphy*, ought to be paid over to the Irish assignees. The Registrar decided that he had no jurisdiction to make the order, upon the ground that Mr. *Dixon*, one of the trustees of the deed of assignment, and one of the persons in whose names the money was deposited, refused to submit to the jurisdiction of the Court; and the Registrar thought that he had no jurisdiction to make a compulsory order against Mr. *Dixon* in favour of the Irish assignees.

I will first consider in whom the legal right to sue for the £4227 9*s*. is vested. It is clear that, by the adjudication against *O'Reardon*, the trustees of *O'Reardon*, and Mrs. *Murphy* became

tenants in common of the joint assets. When Mrs. *Murphy* was adjudicated a bankrupt, and the Appellants were appointed her assignees, the joint assets were vested in the English trustee, and the Irish assignees, as tenants in common. And we are of opinion that the subsequent joint adjudication against *O'Reardon & Murphy* could not affect the title of the English trustee, and that the joint assets remained vested in the English trustee, and the Irish assignees, as tenants in common.

Now the main question to be determined is, whether the £4227 9*s.* ought to be divided among the joint creditors, by the English trustee or by the Irish assignees. If the English trustee is the proper person to distribute the money, we think the Court has power, under the 72nd section of the *Bankruptcy Act*, 1869, to order the money to be handed over to the English trustee, and if the money ought to be distributed by the Irish assignees, we think that the Court would have jurisdiction, under the 74th section, to order the money to be handed over to them, provided a proper order of the Irish Court was made asking the aid of the English Court.

It is, however, unnecessary to consider whether a sufficient order has been made by the Irish Court, unless the Irish assignees are the proper persons to distribute the funds, and I will therefore proceed to consider that question.

There is great difficulty in determining what is the precise effect of a joint adjudication against several partners issued after a separate adjudication against one of them. In the time of Lord *Hardwicke*, as Lord *Eldon* says in several judgments, joint and several commissions were worked together; but since the time of Lord *Eldon*, if not before, the practice has been either to supersede, or at least to impound, one of the two commissions. The ordinary practice has been to supersede or impound the separate commissions on the ground that the joint assets could be best distributed under the joint commission, and in *Ex parte Pemberton* (1) such an order was said to be quite of course. This practice of superseding or impounding the separate commission seems to prove that, as long as the separate commission remained in full force, the joint commission could not be worked. The

(1) 1 M. D. & D. 190.

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joint assets were not vested in the joint assignees. If the joint commission was not wholly void, at any rate the joint assignees and the separate assignees were tenants in common of the joint estate. In *Ex parte Cridland* (1) Lord *Eldon* refused to supersede a joint commission, on account of a previous separate commission in *Ireland* against one of the bankrupts, but he gives no positive opinion as to the effect or even as to the validity of the joint commission. He says (2), "It is too much for me to supersede this commission. The bankrupt may try it, and due attention will be given to the difficulties with which the question is surrounded." Now, in the present case, it seems impossible either to supersede or to impound the separate adjudication in *England;* and indeed we are not asked to do so. The separate creditors of *O'Reardon* are plainly entitled to have the proceedings against him continued in the ordinary way. Then if the adjudication against *O'Reardon* cannot be superseded or impounded, the consequence is that the Irish assignees, notwithstanding the joint adjudication, have no better title to the joint assets than the English trustee. Any action or suit to recover the joint assets, whether in *England* or *Ireland*, ought to be brought by them both. The case, indeed, seems to be the same as if there had been no joint adjudication in *Ireland*, but only a separate adjudication against Mrs. *Murphy*.

On the simple ground of convenience, there is certainly no more reason why the English joint assets should be sent to *Ireland* than why the Irish joint assets should be sent to *England*. The English adjudication was first, the greater number of the joint creditors live in *England*, and there are considerable assets ready for distribution in *England*.

On the whole, we are of opinion that the order of the Registrar should be affirmed, but we think that this is not a case for costs.

Lord Selborne, L.C., concurred.

Solicitors for the Appellants: Messrs. *Linklater & Co.*

Solicitors for the Respondents: Mr. *A. G. Ditton;* Messrs. *Abrahams & Roffey*.

(1) 2 Rose, 164. (2) 2 Rose, 169.

CAVANDER *v.* BULTEEL.

L. JJ.
1873
July 24, 25;
Dec. 2.

[1871 C. 7.]

Constructive Notice—Occupation—Partnership—Tenants in Common.

C. and *B.*, tenants in common in fee, in equal shares, of a messuage and premises, entered into partnership, and it was agreed by the articles that this property should be partnership assets; and it became the place where the business of the firm was carried on. After this *B.* made a legal mortgage in fee of one moiety to secure his private debt to a person who knew that the property was the place of business of the firm. Some years afterwards *B.* absconded, and *C.* was obliged to pay the debts of the firm, all of which had been contracted since the mortgage, and a large balance thus became due to him:—

Held, that as the mortgagee, when he took his security, knew that the firm was in possession of the property, he had constructive notice of the title of the partnership, and that his claim must be postponed to that of *C.*; and that the circumstance of the debts paid by *C.* having been incurred since the mortgage did not affect the case.

THIS was an appeal by the Plaintiff from a decree of the late Vice-Chancellor *Wickens*.

By indenture dated the 29th of December, 1863, a freehold property in *Plymouth* was limited to such uses and upon such trusts as *H. Bewlay* and the Plaintiff should by deed jointly appoint, and in default of appointment as to one moiety to the common uses to bar dower in favour of *H. Bewlay*, and as to the other moiety to like uses in favour of the Plaintiff.

Bewlay and the Plaintiff erected on the property a manufactory and other buildings, and entered into partnership as tobacco manufacturers and snuff and cigar merchants upon the terms contained in articles dated the 3rd of December, 1864, under which these premises were partnership property. The business of the partnership was carried on there.

On the 1st of June, 1866, *Bewlay* mortgaged his moiety of the property to the Defendants, *Bulteel* and others, carrying on business as bankers, to secure the balance due from him to them on his private account, and handed over the deed of December, 1863. The mortgage deed recited the conveyance to *Bewlay* and the Plaintiff without referring to the partnership between them, and

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the property was described as being in the occupation of *Bewlay*, and used by him for carrying on his business as a tobacco manufacturer.

In June, 1870, *Bewlay* absconded, owing to the bankers on his private account a sum exceeding the value of the mortgaged property. The Plaintiff was called upon to pay the debts of the partnership, and paid them all to a considerable amount, the result being that a large sum was due to him on the partnership accounts, and this property was the only partnership asset remaining. He then filed his bill against *Bewlay* and the bankers, alleging that the bankers, at the time when they took the mortgage, had full notice that the Plaintiff was a partner in the firm of *Bewlay & Co.*, and that the property was in the joint occupation of *Bewlay* and the Plaintiff, and that the bankers made no inquiry of the Plaintiff whether it was partnership property, and had, at the date of the mortgage, notice that it was partnership property. The bill prayed for the usual partnership accounts, and to have it declared that the Plaintiff was entitled to be paid what should be found due to him on taking the accounts, in priority to the mortgage of the bankers.

That the bankers, who were also the bankers of the firm, knew *Cavander* to be a partner when they took the mortgage, was not in dispute, but it did not clearly appear on the evidence that they knew the property to be in the occupation of the firm.

Vice-Chancellor *Wickens* made a decree dismissing the bill as against the bankers (1), declaring the partnership between the

(1) March 10.

SIR JOHN WICKENS, V.C. :—

The Defendants *Bulteel*, who are the substantial Defendants in this case, are mortgagees from the Defendant *Bewlay* (who has absconded) of one undivided moiety of premises in *Raleigh Street, Plymouth;* their mortgage deed, which is dated the 1st of June, 1866, purports to convey a legal fee simple, and seems to have done so.

Cavander, the Plaintiff and owner of the other moiety of the premises, was in partnership with *Bewlay* in the trade of tobacco manufacturers and wholesale snuff and cigar merchants. They had bought the land in *Raleigh Street*, which, by a deed of the 29th of December, 1863, was, subject to a general power of appointment in the two, conveyed to them (in effect) as tenants in common, and had erected on it premises for the purpose of their business. Then a partnership was constituted by articles dated the 3rd of December, 1864, which made the premises partnership property. The partnership was dissolved in 1870, and

Plaintiff and *Bewlay* dissolved as from June, 1870, and directing the usual accounts. The Plaintiff appealed.

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it may be taken that the premises in *Raleigh Street* are substantially the only partnership property remaining; that all the debts of the firm have been paid; and that on the account between the partners there is a large sum due to *Cavander*. This he claims to have paid out of the *Raleigh Street* property in priority to *Bulteel's* mortgage.

As *Cavander's* title to what *Bewlay* mortgaged is merely equitable, he must shew that the *Bulteels* had notice of it, in order to establish priority over their legal title. Actual notice he has failed to prove against them, and the question in the case is, whether he has shewn them to be affected with constructive notice.

The bill, as I understand it, asserts that the *Bulteels* (who undoubtedly knew that *Bewlay* and *Cavander* were partners) were aware that the premises in *Raleigh Street* were in their joint occupation, and suggests that at any rate they ought to have inquired of *Cavander* whether he claimed any interest in them before taking the mortgage. The latter proposition (as distinct from the former) seems entitled to no weight. It is not the duty of a a purchaser from one tenant in common in fee to inquire into the title of the co-tenant or co-tenants, even where the tenancy in common is subject to a general power of appointment. And it would be dangerous to hold that there is a difference in that respect where the tenants in common are partners. To do that would, I think, be to extend the doctrine of constructive notice, which, according to *Wilson* v. *Hart* (Law Rep. 1 Ch. 463) and *Ware* v. *Lord Egmont* (4 D. M. & G. 460), it would be improper to do.

It is argued, however, that if the bankers knew that the firm was in possession of the property the case might fall within the well-known doctrine of *Daniels* v. *Davison* (16 Ves. 249), of *James* v. *Lichfield* (Law Rep. 9 Eq. 51), and many other cases, in which it has been laid down that notice of possession is in some cases notice of the possessor's whole title. But I think, after considerable hesitation, that I cannot consider this knowledge as brought home to the bankers. The allegation that they knew it to be in the possession of the firm as a firm, is expressly made in the original bill and denied by the answer, as I read it. There is no proof of it, except the mere unexplained assertion of *Cavander* in his affidavit of the 24th of July, 1871, as to which he was not cross-examined, but to which in any case no weight can be attributed, and the mortgage deed itself states the mortgaged property to be in the occupation of *Bewlay*. The onus of shewing notice is clearly on the Plaintiff, and I think that he has not discharged it. That being my view, it is unnecessary to consider whether the rule in *Daniels* v. *Davison* (16 Ves. 249) would have extended to such a case as this.

The bill contains no prayer for redemption, but if the Plaintiff asks it I will give him the ordinary decree for redemption against the *Bulteels* and *Harris*, their trustee. If not, the bill against those Defendants will be dismissed with costs. As against *Bewlay*, the Plaintiff is entitled to a decree in the terms of the first and second paragraphs of the prayer, with the addition of an inquiry as to what assets of the partnership there are, and with a reservation of further consideration.

(a) 8 C. 12 Jur. N. S. 460

(b) 18 Jur. 871

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It was admitted by the Plaintiff that at the time when *Bewlay* absconded there were no debts owing from the firm which were due when the mortgage was made.

The appeal was opened at some length on the 24th and 25th of July, and their Lordships, not being satisfied on the evidence whether the bankers at the time of the mortgage knew that the mortgaged property was the business premises of the firm, directed that if they disputed this they should attend to be cross-examined. They attended accordingly, on the 2nd of December, and admitted that when they took the mortgage they were aware that the business of the firm was carried on upon the property.

Mr. *Lindley*, Q.C., and Mr. *Jason Smith*, for the Plaintiff, in support of the appeal:—

This case is governed by *Daniels* v. *Davison* (1), which decides that where property is in the occupation of any one, that gives notice of all his rights. Here the property was in the possession of the firm *quâ* firm, and the bankers therefore had notice of the rights of the firm. *Holmes* v. *Powell* (2) carries out the same principle.

[The LORD JUSTICE JAMES:—I am not prepared to go the length of all the *dicta* in that case; it is difficult to see how a possession of which there are no visible signs can put a purchaser on inquiry, and so affect him with notice.]

We are not driven to rely on the doctrine going so far as that, for the bankers here knew of the possession by the partners as partners. *James* v. *Lichfield* (3) applies the doctrine of *Daniels* v. *Davison*.

Mr. *Bristowe*, Q.C., and Mr. *Batten*, for the bankers:—

We submit that it would be a dangerous extension of the doctrine of constructive notice to hold that when two persons to whom property has been conveyed as tenants in common, are in the occupation of it, a person dealing with one of them is to be held to have notice of arrangements between them which affect their rights *inter se*. In *Daniels* v. *Davison* the property was in the possession of some one else, but where two owners are in possession,

(1) 16 Ves. 249. (2) 8 D. M. & G. 572. (3) Law Rep. 9 Eq. 51.

why should any one be called upon to look beyond the deed under which they derive title? The deed describes the property as in the occupation of *Bewlay*, and this statement would exonerate the bankers from further inquiry: *Jones* v. *Smith* (1). Then the debts which the Plaintiff has paid did not exist when the mortgage was taken.

[The LORD JUSTICE JAMES:—I am of opinion that that is perfectly immaterial. If the property was partnership property, and the Defendants had notice of its being so, it must as against them be applied in payment of partnership debts, whether contracted before or after their security.

The LORD JUSTICE MELLISH concurred.]

We contend, further, that the Plaintiff has by his conduct excluded the rule as to constructive notice. He allowed the deed to remain in the possession of his co-partner, though there was nothing on the face of it to shew that the partnership had any interest in the property: *Pilcher* v. *Rawlins* (2).

SIR W. M. JAMES, L.J.:—

The evidence candidly given by the bankers this morning as to the extent of their knowledge removes the ground on which alone the Vice-Chancellor decided this case. His Honour thought that on the materials before him it was not made out that the bankers, at the time when the mortgage was taken, had notice that the firm of *Bewlay & Co.*, *quâ* firm, was in possession of the premises. It is now admitted that the bankers knew this to be the case. The question is whether this constitutes notice of the rights of the partners as between themselves in this property. I am of opinion that, in holding that it does, we are not extending the rule in *Daniels* v. *Davison* (3), that if a person is in possession of property, notice of the title under which he is in possession must be attributed to every one who deals with that property. It was urged that this rule cannot apply where two persons who are tenants in common of property are carrying on business upon it; but the title of the partnership, *quâ* partnership, is quite a distinct thing from the legal title to the freehold. The partnership

(1) 1 Ph. 244. (2) Law Rep. 7 Ch. 259. (3) 16 Ves. 249.

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is a distinct thing; the partnership must be presumed to be legally in possession of the entirety of the property for the purposes of the trade, and therefore, *quâ* partnership, to have some interest in the entirety. The same result then must follow as in other cases where a person is in possession of property—every one who deals with a third party in respect of that property is put upon inqury what the interest of the person in possession is. It is admitted that the rule would have applied if *Bewlay* had been sole owner, or if there had been a third partner who was not one of the tenants in common; but it is difficult to suggest any reason why the circumstance that the tenants in common are the same persons as the partners should make any difference. There was a partnership firm in possession, and that put the bankers on inquiry as to the interest of the firm even more strongly than the purchaser was put upon inquiry in *Daniels* v. *Davison* (1). Then it was urged that the Plaintiff had been guilty of negligence by allowing the deed to come into the hands of a person by whom the bank was deceived; but I can see no ground for imputing negligence to the Plaintiff because he did not take steps to prevent his partner from getting possession of the deeds relating to the partnership property. The Plaintiff, in my opinion, is entitled to the relief he seeks.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I should be sorry to extend the doctrine of constructive notice, but the present case appears to me distinctly within the authority of *Daniels* v. *Davison*. The bankers knew that the Plaintiff and *Bewlay* were originally tenants in common of this property, that after the conveyance of it to them they had entered into partnership, and that the partnership business was being carried on upon the premises. Now partners cannot carry on the partnership business upon property of which they are tenants in common without some bargain as to the use of it for the purposes of the partnership. There may be a bargain that it shall be used for the purposes of the partnership during the partnership term, and that the partnership shall have no further interest; or it may, as in the present case, be made part of the assets of the firm; or there may be some other bargain; but a bargain of

(1) 16 Ves. 249.

some kind there must be. A person, therefore, who knows that the property is occupied for the purposes of the partnership business has notice that the part owners have made some bargain about it which gives each an interest in the moiety belonging to the other, and he is put upon inquiry what the extent of that interest is. I agree, therefore, that the claim of the Plaintiff for what is due to him on the balance of the partnership accounts has priority over the mortgage to the bankers.

Solicitors: Mr. *Weall;* Messrs. *Wedlake & Letts.*

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[1871 B. 258.]

Suit by Person of Unsound Mind not found so by Inquisition—Lunacy—Next Friend.

B. having become of unsound mind, his family applied to *S.*, his agent, to render accounts. *S.* consulted his solicitors, *M. & P.*, who in August, 1871, filed a bill in the name of *B.* by a next friend, who was a stranger to the family, against *S.* for an account. A receiver was appointed, and in December, 1871, without notice to the family, the cause was heard as a short cause, and a decree made directing accounts and inquiries. In March, 1872, *B.* was found lunatic, of which *M. & P.* had full notice. On the 8th of June, 1872, the Chief Clerk made his certificate, and on the 29th of June, 1872, the cause was heard on further consideration, and an order made directing the costs of both parties, as between solicitor and client, to be paid out of the moneys in the hands of the receiver. In the accounts of the receiver as passed were also included considerable sums for his poundage and for the employment of an accountant to investigate the books. Some time after the order on further consideration a committee was appointed in the lunacy:—

Held (varying the order of *Wickens*, V.C.), on petition by the lunatic and his committee, that all the proceedings in the suit after the appointment of a receiver were unauthorized and improper, and that all proceedings after the finding on the inquisition were irregular and void, and that *M. & P.* must make good to the lunatic's estate the sums paid to the accountant, and the sums paid to themselves and the Defendant's solicitors for costs (less the costs up to the appointment of the receiver), and must pay the costs of the Petition, both before the Vice-Chancellor and the Court of Appeal, as between solicitor and client.

THIS was an appeal by a lunatic and his committee from an order of the late Vice-Chancellor *Wickens*, made on a Petition presented

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by them with the sanction of the Master in Lunacy, and praying in effect that certain proceedings and orders in a suit instituted in the name of the lunatic by a next friend might be declared to be improper and unauthorized, and that the solicitor by whom they had been conducted and obtained might indemnify the lunatic's estate from the costs occasioned thereby.

The following statement of the facts is taken, without any variation of substance, from the judgment of the Lord Justice *James*:—

In July, 1871, the lunatic, Mr. *Beall*, was found by the police wandering about the streets, was taken before the magistrates, and after the requisite medical examination, was placed by them in a lunatic asylum. At that time his business and stock-in-trade were under the control of the Defendant, *Charles Frederick Smith*, as his confidential manager and agent. Notice was given to *Smith*, on behalf of the lunatic's family, of his incompetency, with a request that he would give them an account of his receipts and payments and of the stock on the premises. *Smith*, in consequence, consulted his solicitor, who thereupon applied to Mr. *Merriman* (the latter having in some instances acted as attorney for the lunatic) to take some steps to relieve *Smith* from his position.

On the 15th of August, 1871, a bill was filed in the name of *Beall* by *Samuel Morris*, his next friend, against *Smith*, stating that the Plaintiff was incapable of managing his affairs, but that no steps had been taken for obtaining an inquisition, and that there was reasonable ground for believing that he would recover, and that no such inquiry would be necessary. The bill further stated that the Defendant was the Plaintiff's confidential agent and manager, and alleged himself ready to render his accounts to any person who could give him a discharge; and the bill prayed that an account might be taken of the Defendant's dealings as the Plaintiff's manager and agent, and that a receiver and manager might be appointed until the Plaintiff should have recovered, or a committee of his estate should have been appointed, with all proper directions as to the winding-up of the Plaintiff's business and property, or other dealing therewith, as the Court should think fit to give.

This bill was filed by *Merriman & Co.*, as the Plaintiff's solicitors. The next friend was in no way connected with the

Plaintiff, was an entire stranger to him and to his family, and was in fact found by Mr. *Merriman* for the purposes of the suit. There was some conflict of evidence as to his pecuniary circumstances, but it appeared that he had shortly before been a bankrupt, and that shortly afterwards he declared himself insolvent. It was shewn to the satisfaction of the Court that the suit was not his, that he was only a nominee of Mr. *Merriman*, who was a large creditor of his, and that he never had or claimed to have any voice or control as to the institution or prosecution of the suit. On the filing of the bill an application was made in the vacation to the Vice-Chancellor's Chief Clerk for a receiver. The Chief Clerk required that notice should be given to the family, who attended by Mr. *Heather*, their solicitor. The latter protested against the suit as unnecessary, but appeared to have at last acquiesced in the appointment of a receiver. The Chief Clerk, however, thought it necessary to take the Vice-Chancellor's personal direction on the subject, and the Vice-Chancellor, under the peculiar circumstances of the case, thought a receiver might be appointed on the terms assented to by the family solicitor. There was some contradictory evidence as to what those terms were, but the Court considered it to be proved that Mr. *Heather*, amongst other things, stipulated that nothing should be done without notice to him. Another summons was then taken out before the Chief Clerk for an order directing the sale of the stock-in-trade and other property of the lunatic. Of this summons notice was given to Mr. *Heather*, who opposed it, except so far as it related to the stock. There was some conflict of testimony as to what the verbal decision of the Chief Clerk was, and no order was drawn up as to any part of the application.

After this, and without any notice to Mr. *Heather*, or to any person on behalf of the family, the cause was set down for hearing as a short cause, and on the 16th of December, 1871, a decree was made continuing the receiver and manager, and directing, first, an account of all dealings and transactions of the Defendant as the Plaintiff's manager and agent; secondly, an inquiry what steps ought to be taken as to the surrender, sale, or other disposition of the leasehold property of the Plaintiff used for the purposes of his business, and as to the rents due in respect thereof, and as to the

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sale and disposition of the stock-in-trade, fixtures, and effects belonging to the Plaintiff's business; thirdly, an inquiry what steps, if any, ought to be taken with a view to ascertain the mental condition of the Plaintiff, and whether any and what proceedings should be taken in Lunacy or otherwise for the protection of the Plaintiff's person and estate, and by whom such proceedings, if any, should be instituted. Further consideration was adjourned, with liberty to apply.

The suit went on in its regular course, the stock was sold, the inquiries prosecuted, and the accounts taken in Chambers, and a certificate made, dated the 8th of June, 1872, whereby it was certified that the Defendant had brought in his accounts, shewing a balance due from him of £57 11*s.* 10*d.*, which he had paid to the receiver, and handed over to him all books and papers, and that the accounts had not been further investigated. It was further certified that the stock had been sold by the receiver on the 13th of March, 1872, and that the Plaintiff, on the 25th of March, 1872, was found lunatic by inquisition; and the third inquiry had, therefore, not been further prosecuted. And it was found by the certificate that a committee of the estate had not been appointed.

On this certificate the cause was set down for further consideration, and heard as a short cause on the 29th of June, 1872. By the order then made, it was ordered that the costs of the Plaintiff and Defendant should be taxed as between solicitor and client, including in the costs of the Plaintiff any costs, charges, and expenses properly incurred of and incident to the inquisition in Lunacy and the proceedings thereunder in the certificate mentioned; and it was ordered that the costs, when taxed, should be paid by the receiver, and that the receiver should be discharged, and pass his final account, and pay the balance to the credit of the cause, and that the balance, when so paid in, should be invested and accumulated.

The balance in the receiver's hands was arrived at by, amongst other things, charging him with the sum which he had himself received on his settlement of the accounts with the Defendant *Smith*, and by his discharging himself by the following items, viz: Paid to *Merriman, Powell, & Co.* for the Plaintiff's costs of suit, and costs incurred in the lunacy, £207 6*s.* 5*d.*; and to the solicitors

of the Defendant £51 17*s.* 4*d.* for their costs of suit, pursuant to a certificate of the 21st of September, 1872; receiver's poundage, £144 6*s.* 3*d.*; and to an accountant for investigating the books £246; with some other items, making in the whole nearly £700. The gross amount got in was £2886 6*s.* 1*d.*

The Defendant *Smith* had settled his accounts with the receiver in September, 1871; Mr. *Smith's* account, the last item in which was dated the 22nd of September, 1871, being closed by a payment to the receiver of the balance in his hands of £57 11*s.* 10*d.*, and in the receiver's account the first item was "*C. T. Smith*—balance of cash in his hands, £57 11*s.* 10*d.*" And it appeared that there was not any further or other taking of the accounts of the Defendant *Smith* in the suit except his formal affidavit verifying the account shewing such balance.

On the 17th of February, 1872, while the suit was in progress, the usual petition for an inquiry was presented in Lunacy, of which petition Messrs. *Merriman & Co.* had notice, and appeared on behalf of the lunatic to demand a jury. On the 13th of March, 1872, Mr. *Beall* was found to be a lunatic, of which finding notice was also given to Messrs. *Merriman & Co.* On the 24th of July, 1872, the Master reported that Mr. *Richard Beall*, the son of the lunatic, should be appointed committee of the estate. The order was confirmed on the 29th of July, 1872, but from some delay as to the recognizances, the appointment was not actually completed until December, 1872. It was then for the first time discovered by the committee and by his solicitor that the estate of the lunatic had been dealt with as before stated, and, with the assent of the Master in Lunacy, a petition was presented in the suit praying that the proceedings in the suit subsequent to the finding that *Beall* was a lunatic, and in particular the certificates of the 8th of June, 1872, and the 21st of September, 1872, and the order on further consideration of the 29th of June, 1872, might be set aside for irregularity, and that Messrs. *Merriman & Powell* might be decreed to make good to *Beall's* estate the amounts paid by the receiver by virtue of the order on further consideration; and that it might be declared that the institution and prosecution of the suit in the name of *Morris* as the next friend of *Beall*, without the knowledge

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or concurrence of any member of *Beall's* family, was unnecessary and improper, and that the Respondents, or such of them as the Court should think just, might be ordered to indemnify *Beall's* estate against the costs of the suit, or such part thereof as the Court should deem proper; and that Messrs. *Merriman & Powell* might be ordered to make good such parts of the costs of the suit as *Morris* might be ordered to indemnify the estate against, and should not be able to satisfy; and that the costs of the application might be paid by the Respondents, or such of them as the Court should think just.

The Respondents were, *Morris*, the next friend, *Smith*, the Defendant, and Messrs. *Merriman & Powell*.

The Petition was heard by the late Vice-Chancellor *Wickens*, who, on the 30th of June, 1873, with the consent of *Smith*, made an order directing inquiries, 1, whether any sum of money had been allowed against *Beall's* estate in the accounts either of the receiver or the Defendant beyond what ought to have been allowed to them on those accounts; and in making this inquiry *Beall* was to be allowed to surcharge and falsify the accounts already taken under the decree and the order on further consideration, or either of them. 2. An inquiry what sum (if any) was paid to the Defendant for his costs directed to be taxed by the order on further consideration in excess of what ought to have been paid him for costs as between party and party. 3. An inquiry what sum was received by Messrs. *Merriman & Powell* under the order on further consideration for costs of lunacy proceedings in excess of what costs (if any) ought to have been allowed them on that account. Further consideration of the Petition was adjourned, with liberty to apply.

Beall and the committee appealed from this order.

Mr. *Bristowe*, Q.C., and Mr. *Freeling*, for the Appellants.

Mr. *Greene*, Q.C., and Mr. *Bradford*, for *Morris*, the next friend, and for *Merriman & Powell*.

Mr. *Lindley*, Q.C., and Mr. *Horton Smith*, for the Defendant.

The following authorities were referred to:—*Hartley* v. *Gil-*

(1) See 17 W. R. (1873) 161.

bert (1); *Light* v. *Light* (2); *Re Macfarlane* (3); *Wartnaby* v. *Wartnaby* (4); *Nelson* v. *Duncombe* (5); *Attorney-General at relation of Fox* (6); *Elmer* on Lunacy (7); *Beverley's Case* (8); *Statute de Prerogativâ* (17 Edw. 2, c. 9); *Winthrop* v. *Winthrop* (9); *Shelford* on Lunacy (10); *Collinson* on Lunatics (11).

Dec. 6. SIR W. M. JAMES, L.J., after stating the facts to the same effect as above, continued:—

It is difficult to see how the order now under appeal can be right. The committee cannot go in in that suit to surcharge and falsify the accounts without making himself a party to it, and adopting and ratifying the suit and proceedings, the very things of which he is complaining, his case being that the whole proceedings were improper, and after a certain stage irregular. Is it, then, the law of this Court that any solicitor may institute a suit and take any proceedings he may think proper so as to bind the estate of a person of unsound mind, and that by virtue or under colour of orders of Court obtained by himself of his own authority, without any check whatever, he may employ and pay an accountant at any rate of remuneration, pay himself and others any amount of costs, and take and settle the accounts between the lunatic and the lunatic's agent or other debtor? It would be very startling if this were so, and still more startling if this could be done after the lunatic had been placed under the proper protection provided by the law by a petition for an inquiry, by the inquiry and the finding. The law of the Court of Chancery undoubtedly is that in certain cases where there is a person of unsound mind, not found so by inquisition, and therefore incapable of invoking the protection of the Court, that protection may in proper cases, and if and so far as may be necessary and proper, be invoked on his behalf by any person as his next friend. But every person so constituting himself

(1) 13 Sim. 596.
(2) 25 Beav. 248.
(3) 2 J. & H. 673.
(4) Jac. 377.
(5) 9 Beav. 211.
(6) Mitf. Plead. 32, n.
(7) 5th Ed. 1.
(8) 4 Rep. 123 b.
(9) 1 C. P. Coop. Temp. Cott. 196.
(10) Page 74.
(11) Vol. i. p. 192.

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officiously the guardian, committee, and protector of a person of unsound mind does so entirely at his own risk, and he must be prepared to vindicate the necessity and propriety of his proceedings if they are called in question, and to bear the consequences of any unnecessary and improper proceedings. He takes the risk, moreover, of having his proceedings wholly repudiated by the lunatic, if he should recover his reason, just as the next friend of an infant runs the risk of having his proceedings wholly repudiated on the infant attaining his full age. It is to be borne in mind that unsoundness of mind gives the Court of Chancery no jurisdiction whatever. It is not like infancy in that respect. The Court of Chancery is by law the guardian of infants, whom it makes its wards. The Court of Chancery is not the curator either of the person or the estate of a person *non compos mentis*, whom it does not and cannot make its ward. It is not by reason of the incompetency, but notwithstanding the incompetency, that the Court of Chancery entertains the proceedings. It can no more take upon itself the management or disposition of a lunatic's property than it can the management or disposition of the property of a person abroad, or confined to his bed by illness. The Court can only exercise such equitable jurisdiction as it could under the same circumstances have exercised at the suit of the person himself, if of sound mind. If there be a trust property in which the person is beneficially interested, the Court may, no doubt, deal with it in such manner as it may deem just, and it will, if necessary, ascertain the nature and extent of his interest, and will authorize, and, in a proper case, compel, the trustee to deal with the lunatic's interest in the trust property for his benefit. But that arises from its inherent absolute jurisdiction over trusts and trust funds. So, in a case of partnership, it may make the necessary orders with respect to the partnership and its assets, notwithstanding the incompetency of a partner; but that, again, is a consequence of its ordinary jurisdiction in partnership matters, which is not ousted or paralysed by such incompetency. And perhaps the more common case of its interference is where the incompetent person, by his next friend, seeks to set aside instruments or other gifts obtained by persons taking fraudulent advantage of his mental weakness. But I know of no authority and no principle

for the Court of Chancery taking into its care the estates or other property of which such a person is the legal owner, or appointing a receiver of rents or debts legally due to him, or settling or dealing with his legal creditors or debtors. It is not surprising, therefore, that the Vice-Chancellor at the outset hesitated even as to making the first order appointing a receiver and manager of the business and stock. But the Vice-Chancellor did, after his attention had been called to the facts of the case, make such order, which may perhaps be justified by considering the Defendant *Smith* as a *quasi* trustee of the property in his hands by reason of his fiduciary position. But when that order had been obtained every legitimate object of the suit had been effected, and it is impossible to suggest any benefit that could possibly have accrued to the lunatic from its further prosecution, much less from hurrying it on, as was done. It was quite clear that if the lunatic recovered he could act for himself; it was also clear that if he did not within a few months recover, it would be necessary to obtain for him the legitimate protection of the Court in Lunacy. If the order for a receiver and manager was really within the jurisdiction of the Court, of course that order itself would enable him to get in the trade debts and realize the trading stock, which was all that could be done. Let us see, however, what was proposed to be done by the decree. (1.) To take an account of the dealings and transactions of the Defendant as the Plaintiff's agent. How could such an account be taken in the absence of any person legally authorized or really competent to represent the lunatic? Supposing it had, instead of shewing a balance of £50 due to the lunatic, shewn a balance of £500 or £5000 due from him, could the Court have made an order on him to pay it? The Court, of course, has no means itself, *ex officio*, of taking such an account; it can only deal with the matters brought before it. The solicitor could not have taken on himself out of Court to settle such an account, and the form of taking the accounts in Court, where the solicitor had the sole control of the proceedings, was merely and necessarily a sham, to give colour to what had been done out of Court. In fact the account, so far as it was capable of being taken at all, was taken before the decree, between the receiver and the agent; and the sole practical result of all the proceedings in the

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suit was an affidavit of the agent swearing to the correctness of his own account. This is all that can be shewn as the fruit of hundreds of pounds of expense. The lunatic had no interest whatever in having this account ratified and confirmed by the Court. No doubt the Defendant *Smith* had an interest in getting his own accounts so ratified and confirmed if he could. In fact, the suit, which was originally instituted to relieve *Smith* from the embarrassment he was in, was continued in order to give him a final settlement, release, and discharge. But what possible justification can there be for spending a lunatic principal's money in the relief and release of his agent? (2.) Take the inquiry which next follows. What could be more idle than that? The Court could do nothing upon it. It could not sell, it could not surrender, it could not dispose of anything, except so far as was necessarily incident to the duties of a receiver, even if so far as that. (3.) This inquiry is also a most singular one. The Court of Chancery has no jurisdiction to direct or to interfere with proceedings in lunacy. Some precedent might possibly be found for such an inquiry, but that must have been where there was a *non compos cestui que trust*, and with a view to the application of a trust fund or other fund under the administration of the Court as the result of such an inquiry. Further, how could such an inquiry, or the previous inquiry, be pertinent to a suit against the Defendant *Smith*, who, when he had handed over the stock to the receiver, had nothing further to do with the lunatic's estate or affairs, except to settle his own balance? It may be said that the Court made the order, but I repeat that as between a person *non compos mentis*, who could give no authority or instructions, and a solicitor proposing to act in his interest and on his behalf, the orders of the Court obtained by the latter give him no protection. They are, as between them, really the solicitor's own orders. All the subsequent proceedings, with their ruinous costs, flowed out of this decree, which, in my opinion, was most unnecessarily, improperly, and recklessly taken.

Besides these considerations, there is still another grave question to be dealt with. The bill purports to be the bill of a person of unsound mind, not found so by inquisition, suing by his next friend. It is essential to any such suit that the Plaintiff should be of unsound mind, and that he should not have been found so by

inquisition. What is the effect of that state of things ceasing to be? I am of opinion on principle, and there is no authority to the contrary, that the suit is absolutely paralysed thereby. If he becomes of sound mind, the next friend can have no pretext for continuing his intervention; if he is found lunatic by inquisition, so as to be under the control and protection of the Crown and of the Court in Lunacy, there is equally no pretext for continuing the officious protection of a self-constituted guardian or committee when there is a legitimate protection in the proper tribunal. We were referred to some decisions or *dicta* to the effect that a suit becomes abated by the appointment of a committee, and it was contended from this that there was no abatement until such appointment. But there is no decision that it can go on in the interval between the inquisition and the appointment, and Vice-Chancellor *Shadwell* expressed a clear opinion that going on even after the commencement of proceedings in Lunacy would be a fraud on the jurisdiction. It is not suggested that such a bill could be filed in the interval between the inquisition and the final appointment of a committee, or in the interval between the death of one committee and the appointment of another. The committee is only an officer of the Court, the Court itself being only the delegate of the Crown's prerogative. It is not because a committee has been appointed, but because the Crown, by its proper tribunal, has the lunatic and all his affairs under its exclusive care and protection, that the power of any person to commence or to prosecute any proceedings for his protection is taken away. There is no inconvenience or injustice in this. Application can at all times be made to the Court for anything that may require or may be just to be done, and no doubt if any person who has interfered for the protection of a lunatic can satisfy the Court that he has acted *bonâ fide*, and for the benefit of the lunatic, the Court will reimburse him, as it would recompense any other person who had rendered services to the lunatic. I am satisfied, therefore, that every proceeding and every order taken or made in the suit after the inquisition was irregular and void, as much so as if it had been taken or made after the lunatic's death. Moreover, any such attempt to deal with a lunatic's property after the inquisition amounts to a gross contempt of the Court in Lunacy.

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It was strongly urged upon us that the proceedings of the solicitors were *bonâ fide*. I cannot accede to this view. They might have been *bonâ fide* in this sense—that they thought they might legally take them. But it is, in my judgment, impossible that they could have *bonâ fide* thought that they were prosecuted for the benefit of the lunatic, which was the only thing they had a right to regard. I am satisfied, on the contrary, that they were taken for their own purposes. They had resolved, if possible, to secure to themselves the administration and winding-up of the lunatic's estate, to the exclusion of his family. When the family solicitor objected to an order sought from the Chief Clerk, they, without any necessity or urgency, set down the cause for hearing as a short cause, with the object of obtaining the apparent sanction of the Court to their interference with the lunatic's property and affairs, in a way for which there is no legal or other authority. When the inquisition was held and the Plaintiff had been found lunatic—a proceeding and finding which everybody must have known to have been inevitable—they proceeded with the inquiries, and to set down the cause on further consideration, obviously running a race with the proceedings in Lunacy, and in the hope and for the purpose of getting the matter finally disposed of in Chancery before the appointment of a committee, and so as to anticipate, as they hoped, any interference of the committee or any interposition of the proper jurisdiction in Lunacy. They have failed in this, and they must bear the consequences. In my judgment, the committee—that is to say, the lunatic by his committee—is entitled as of right to a declaration that all the proceedings after the appointment of a receiver were unauthorized and improper, and that all the proceedings after the finding on the inquisition were irregular and void. The solicitors are responsible for this, and the lunatic's estate must be made good by them.

The proper order now to be made will be to direct the money in Court in the suit to be transferred to the credit of the lunacy, to order the solicitors to pay into Court in the lunacy the sums paid for costs both to themselves, to the Defendant's solicitor, and to the accountant, deducting the costs of the suit up to the appointment of the receiver. The Taxing Master will have no difficulty

L. JJ. 1873 BEALL v. SMITH.

in telling us the amount of those costs before the order is drawn up. I say nothing about the receiver's poundage and costs, because, as the estate takes the money in Court, it is perhaps not right to disturb the retention by him of his reasonable poundage in and for realizing the stock and debts. As between the estate and the Defendant *Smith*, the committee will be at liberty to take such proceedings as he may be advised for obtaining any better or other account from him. It is, I trust, probable that there will be no necessity for acting on this.

This being a case of improper proceedings on the part of solicitors of the Court, they must pay all the costs, including the costs of the appeal, and as between solicitor and client, as in my judgment the lunatic is entitled to have his estate fully reimbursed and made good.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Heather & Son;* Messrs. *Sole, Turner, & Turner;* Messrs. *Merriman, Powell, & Co.*

See Order Seton 6 & 8 Reg Lib 1873 A 3105

In re EDWARDS, A PERSON OF UNSOUND MIND.

In re LONDON, BRIGHTON, AND SOUTH COAST RAILWAYS ACT.

L. JJ. 1873 *Nov.* 22; *Dec.* 6.

Marriage Settlement—Covenant to settle Future Property of Wife.

In a marriage settlement a covenant to settle the wife's after-acquired property will, in the absence of expressions shewing a contrary intention, be construed as applying only to property acquired during the coverture, although the words "during the said intended coverture" are omitted.

Dickinson v. *Dillwyn* (1) and *Carter* v. *Carter* (2) approved. *Stevens* v. *Van Voorst* (3) overruled.

18 Eq 441 2 Ch D 70 3 Ch D 77 6 Ch D. 68

BY a settlement dated the 13th of October, 1843, made on the marriage of *George Robinson* with *Caroline Rowley Edwards*, which

(1) Law Rep. 8 Eq. 546. (2) Law Rep. 8 Eq. 551.
(3) 17 Beav. 305.

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recited that the intended wife, under the will of *Elizabeth Braune*, and a codicil thereto, was entitled to certain parts, shares, rights, and interests in the property of *Elizabeth Braune*, and that on the treaty for the marriage it was agreed that the parts, shares, rights, and interests of the wife in the property of *Elizabeth Braune* should be assigned and assured to the trustees, their executors, administrators, and assigns, upon the trusts thereinafter mentioned, and that the intended husband and wife should covenant and agree that if they, or either of them in her right, should thereafter acquire any property, the same should be settled in manner thereinafter mentioned, Mrs. *Robinson* assigned to the trustees all her interest whatsoever, present or future, vested or contingent, in the property of *Elizabeth Braune*, under and by virtue of her will and codicil, or otherwise howsoever, and of and in the moneys to arise from the sale thereof, and the funds and securities in or upon which the same might be invested, and of and in the income thereof, to hold the premises to the trustees, their executors, administrators, and assigns, upon trust for Mrs. *Robinson* till the marriage, and after the marriage upon the trusts therein mentioned, and being the ordinary trusts of a marriage settlement. The settlement contained the following covenant :—

"And it is hereby agreed and declared between and by the parties to these presents, and the said *Geo. Robinson* and *C. R. Edwards* do for themselves respectively, and their respective heirs, executors, and administrators, covenant with the said [trustees], their executors, administrators, and assigns, that in case, after the said marriage, the said *C. R. Edwards* and the said *Geo. Robinson*, or either of them in her right, shall become entitled to any moneys or other property, real or personal, or both, by any means whatsoever, then and in such case all such moneys or other property shall, at the cost of the said trust funds, be vested in the said [trustees] or the survivor of them, or other the trustees or trustee under these presents, by such acts or deeds as they or he shall think proper." There followed a declaration of trust by reference to the trusts previously declared of the funds assigned.

George Robinson died in September, 1870. The widow was still living, and there were several children of the marriage.

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The above-named *Elizabeth Braune*, who died in 1829, had devised by her will three cottages at *Mitcham* in trust for *Maria Elizabeth Edwards* for life, with remainder to her surviving children. These cottages were taken by a railway company, and in 1868 the purchase-money was paid into Court. *Maria Elizabeth Edwards* died in 1872, leaving three children—the above-named Mrs. *Robinson*, Mrs. *Geary*, and *Charles Marshall Edwards*, a lunatic. By order of the 20th of December, 1872, one-third of the purchase-money was paid to Mr. *Geary* in right of his wife, one-third to the trustee of Mrs. *Robinson's* settlement, and the remaining third was carried to the lunatic's separate account. *Charles Marshall Edwards* died on the 9th of June, 1873, intestate and a bachelor, leaving Mrs. *Robinson*, and *Joshua Falle Geary*, the son of Mrs. *Geary*, his co-heirs.

Mrs. *Robinson* and *J. F. Geary* now petitioned for payment of the share of *C. M. Edwards* to them in moieties, and the question arose whether Mrs. *Robinson's* moiety was affected by the covenant for settlement of future property, her title to it having arisen after the determination of the coverture.

Nov. 22. Mr. *Horsbrugh*, for the Petitioners, referred to *Howell* v. *Howell* (1), *Reid* v. *Kenrick* (2), *Dickinson* v. *Dillwyn* (3), *Carter* v. *Carter* (4), and *In re Clinton's Trust* (5).

Mr. *Ince*, for the trustee, referred to *Stevens* v. *Van Voorst* (6).

Mr. *Tweedy*, for the railway company.

THE COURT made the order subject to the consent of Mrs. *Robinson's* children being obtained, which would make it unnecessary to decide the question as to the effect of the covenant, it being believed that they were all adult, and would consent.

Dec. 2. It was stated to the Court that the children were not

(1) 4 L. J. (Ch.) 242.
(2) 24 Ibid. 503.
(3) Law Rep. 8 Eq. 546.
(4) Law Rep. 8 Eq. 551.
(5) Ibid. 13 Eq. 295.
(6) 17 Beav. 305.

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all of age, and that it would be necessary for the Court to decide the point.

Dec. 6. SIR W. M. JAMES, L.J. :—

The primary object of a covenant to settle the future property of a wife is to prevent its falling under the sole control of the husband, and it therefore *primâ facie* is to be supposed not to be intended to apply to property the wife's title to which does not accrue until after the husband's death. We have consulted the Lord Chancellor on the case, and he agrees with us in the opinion that, in the absence of any expressions shewing that a covenant of this nature was intended to have a more extended operation, it is to be construed as if the usual words, "during the said intended coverture," had been inserted. It appears to His Lordship, as well as to us, that the rule laid down in *Dickinson* v. *Dillwyn* (1) and *Carter* v. *Carter* (2) is to be followed, and not the rule which was acted upon in *Stevens* v. *Van Voorst* (3). The order, therefore, will be for payment of Mrs. *Robinson's* share to her.

Solicitor: Mr. *Edward Moss.*

(1) Law Rep. 8 Eq. 546. (2) Law Rep. 8 Eq. 551.
(3) 17 Beav. 305.

CONN *v.* GARLAND.

L. C.
1873
Dec. 17, 19.

[1865 C. 111.]

Practice—Sequestration—Deposit on Appeal.

Where the deposit on an appeal had been ordered to be returned to the Appellant, and before it was paid to him sequestration was issued against him for non-payment of costs previously due, the deposit was ordered to be paid to the sequestrators instead of the Appellant.

BY a decree made in this suit by the Master of the Rolls on the 20th of March, 1868, the Plaintiff, *William Conn*, was declared entitled to accounts of certain partnership transactions between himself and the Defendants and others, his late partners, and the accounts were directed accordingly, and the further consideration and costs were reserved.

On the 8th of June, 1869, the Plaintiff applied in Chambers for an order against the Defendants for production of documents, but the Master of the Rolls refused to make any order, except that the Plaintiff should pay the costs of the application.

By an order dated the 24th of March, 1873, made on the motion of the Plaintiff, it was ordered that the Plaintiff should pay to the Defendants the sum of £146 12*s.* 8*d.*, being the amount of the taxed costs of the application of the 8th of June, 1869, and also the costs of that motion, and that thereupon the time for the Plaintiff to appeal against the decree of the 20th of March, 1868, should be extended to the 20th of September, 1873.

On the 18th of September, 1873, the Plaintiff presented his petition of appeal, in which he stated that he had paid the said sum of £146 12*s.* 8*d.*, and the taxed costs of the motion of the 24th of March, 1873. He paid into Court the usual deposit of £20, and the Petition was set down for hearing.

Notwithstanding the statement in the Petition the Plaintiff did not pay the sums mentioned; and accordingly, on the 12th of November, 1873, the Defendants moved before the Lord Chancellor to discharge the order to set down the appeal, and the Lord

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Chancellor made an order discharging the order to set down the appeal without costs, and ordered that the deposit of £20 should be returned to the Plaintiff.

On the 1st of December, 1873, a writ of sequestration was issued against the estate and effects of the Plaintiff for non-payment of the said sum of £146 12*s.* 8*d.*

The sequestrators now moved that the deposit of £20 might, notwithstanding the order of the 12th of November, 1873, be paid to them instead of to the Plaintiff.

Mr. *Cookson* appeared in support of the motion, and referred to *Wilson* v. *Metcalfe* (1).

The Plaintiff appeared in person and opposed the application.

LORD SELBORNE, L.C., said that he was of opinion that the writ of sequestration entitled the sequestrators to attach the £20 deposited with the Court on presenting the Petition of appeal, and which had been previously ordered to be returned to the Plaintiff. The order must, therefore, be made in terms of the motion.

Solicitors for the Sequestrators: Messrs. *Bolton, Robbins, & Busk*, agents for Mr. *S. T. G. Downing, Redruth.*

L. C. and L. JJ. 1873 *Nov.* 19.

In re METROPOLITAN PUBLIC CARRIAGE AND REPOSITORY COMPANY.

BROWN'S CASE.

Company—Contributory—Director—Qualification—Paid-up Shares—Companies Acts, 1862, *and* 1867.

Where the holding of a certain number of shares is a necessary qualification for a director, merely acting as a director does not amount to a contract by the person so acting to take that number of unpaid shares directly from the company.

Each of the directors of a company was obliged to hold fifty shares. *B.*, at the request of the promoter of the company, assented to become a director

(1) 1 Beav. 263.

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and attended a meeting. By the direction of the promoter, who was entitled to a large number of paid-up shares in the company, paid-up shares sufficient for the qualification of a director were registered in *B.*'s name :—

Held, that any implied contract by *B.* to take shares, was fulfilled by his acquiring shares in that manner :

Held, that, under the circumstances, the shares registered in his name must be taken to have been so registered in order to qualify him as a director, or else that the agreement under which he became a director was not complied with, and he was not a shareholder.

Order of *Wickens*, V.C., affirmed.

Marquis of Abercorn's Case (1) and *Leeke's Case* (2) considered.

THE *Metropolitan Public Carriage and Repository Company, Limited*, was registered on the 11th of March, 1870, with a capital of £100,000 in £1 shares. One *J. C. Broomfield* appeared to have paid the registration fee, and to have exerted himself for the company, and to have engaged to find capital and directors, on the understanding that he was to receive for his services a considerable number of paid-up shares in the company.

By the articles of association it was provided that the qualification for a director was to be the holding of fifty shares. The evidence in the case was somewhat scanty, but it appeared that *Brown* and two other persons were proposed as directors by *Broomfield*.

The first meeting of directors was held on the 15th of March, at which *Brown* was formally appointed a director. The next meeting was held on the 18th of March, at which *Brown* was present. His name was published as that of a director, but he was not shewn to have attended any other meetings until after the shares had been placed in his name.

On the 25th of March a formal agreement between the company and *Broomfield* was made and approved of, by which the company agreed to allot to *Broomfield* £5000 in fully paid-up shares of the company; and *Broomfield* agreed to float the company and pay all expenses of floating it and of raising the capital, but in the event of his not raising the capital he was to receive only shares equivalent to the amount of the capital raised by him, and was to return the surplus shares; if there was no allotment to the public the 5000 shares were to be cancelled. No shares were ever registered in *Broomfield's* name, but at different

(1) 4 D. F. & J. 78. (2) Law Rep. 6 Ch. 469.

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times fully paid-up shares to the number of 3899 were allotted to his nominees. One of his nominees was *Brown*, to whom fifty shares were, at a meeting on the 29th of March, allotted, which shares were duly registered in his name as paid-up shares, and *Broomfield's* account was debited with a corresponding sum.

Not quite 5000 shares were applied for by the public. The company did not begin to carry on business, and was, on the 16th of February, 1871, ordered to be wound up. *Broomfield* had not paid all the expenses of floating the company, and on his examination in the winding-up he stated that he did not consider himself entitled to the 5000 shares.

Brown and two other directors, who were in a similar position, were, by the Chief Clerk of the Vice-Chancellor *Wickens*, excluded from the list of contributories, and the Vice-Chancellor *Wickens* in Chambers refused to vary the Chief Clerk's certificate.

The official liquidator appealed.

Mr. *Jackson*, Q.C., and Mr. *E. Cutler*, in support of the appeal:—

Where a man acts as a director, and must hold shares in order so to act, that is an agreement to take shares from the company: *In re Disderi & Co.* (1); *Leeke's Case* (2); *Harward's Case* (3). *Marquis of Abercorn's Case* (4) was before the Act of 1862, and is not consistent with the recent cases: *Levita's Case* (5); *Forbes & Judd's Case* (6). The acceptance of the office of director has in all the late cases been held to be an agreement to take shares. It is true that shares were transferred into *Brown's* name, but it does not follow that those were the shares he agreed to take. The onus of shewing that they were lies on him. The dates of the transactions tend to disprove it. Besides, *Broomfield* entirely failed to do what he had engaged to do, and had no right to the shares.

Mr. *Hamilton Humphreys*, for *Brown*, was not called upon.

LORD SELBORNE, L.C.:—

We think there is no reason for dissenting from the opinion which we must infer the Vice-Chancellor formed in this case, and

(1) Law Rep. 11 Eq. 242.
(2) Ibid. 6 Ch. 469.
(3) Ibid. 13 Eq. 30.
(4) 4 D. F. & J. 78.
(5) Law Rep. 3 Ch. 36.
(6) Ibid. 5 Ch. 270.

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we think we may, without much risk of error, imagine what were his reasons, though they are not actually given to us.

Mr. *Jackson* has argued that in a company, the rules of which require that a director should have the qualification of a certain number of shares, the mere acceptance of the office of director by a person who has not the necessary number of shares carries with it from that moment of time (I think the argument must be carried so far) an implied contract that he will take from the company that number of shares, either immediately or at least before he acts as a director.

Without, in the first instance, referring to authority, it is obvious that the argument labours under this difficulty, that the qualification clause does not require that the director shall take shares from the company. The clause at the utmost means only that if he acts as he ought to act, with the proper qualification (without which he is no doubt disqualified), he must in some way possess himself of the necessary number of shares. But in whatever way he may manage to possess himself of those shares, if he does so he has the qualification; and it is quite unnecessary that he should for that purpose enter into a contract with the company, and so become the original holder of shares, if it is possible for him to acquire them otherwise.

Now the authorities which have been cited really are inconsistent with Mr. *Jackson's* argument. The only case in which the question was neatly raised was the *Marquis of Abercorn's Case* (1), which was before the Court of Appeal, at that time presided over by Lord Justice *Knight Bruce* and Lord Justice *Turner;* and in that case the naked question was raised, whether from the acceptance of the office of director and the consequent authorized representation to the world that the person so accepting was a director, such representation being continued over a certain period of time—whether from that alone a contract with the company to take shares could be inferred. In that particular case the option was either to have shares or to insure in the company. But there were various ways by which the shares might be acquired, and the Lords Justices held that, from the mere acceptance of the

(1) 4 D. F. & J. 78.

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office of director, without more, they could not infer a contract to become a shareholder.

The other authorities are all cases in which, as a matter of fact, shares had been registered in the name of the director—which circumstance occurs in this case also—and in those other cases it was, in my opinion, most justly regarded as a very material fact to be considered, when a director tried to get rid of the shares actually registered in his name, that he had accepted the office of director, which a man ought not to fill without qualification. In such cases a director must have a qualification, and is bound as a director to be acquainted with what is done in the management of the affairs of the company. It was, therefore, a just conclusion of fact, that an act done by a person acting under the authority of the directors, the result of which was to place in the name of a director shares which he ought to have as a qualification—that that act was done by his authority, and that he could not be allowed to repudiate it. For my part, I see no reason to doubt that the various cases which arose on that state of circumstances were well decided. There may be found in some of the cases (I think before Vice-Chancellor *Malins* in particular) some *dicta* not necessary for the decision of the question, which would appear to go to an extent not *primâ facie* reconcilable with the decision in the *Marquis of Abercorn's Case* (1), as to the value of the single circumstance of acceptance of the office of director. But it seems to me to be only just to the learned Judge from whom those *dicta* proceeded to remember, that Judges have tacitly in their minds the circumstances and facts of the particular case before them, when they speak of the influence of any material fact in the evidence which they have to consider. They are not to be supposed to forget that there are other facts, but they speak of the value of the particular fact, bearing in mind the general character of the entire case.

I think, therefore, that it would not be placing a fair interpretation on the language found in some of those cases, if we were to infer that the learned Judge from whom that language proceeded felt himself authorized in judicially expressing dissent from what

(1) 4 D. F. & J. 78.

was decided by the Lords Justices in the *Marquis of Abercorn's Case.* I do not, for my part, place that interpretation on the language in question.

The true result to be drawn from those authorities appears to be, that the fact of a man accepting the place of director, for which the possession of a certain number of shares is a necessary qualification, is most material in determining whether he shall or shall not be permitted to repudiate, as unauthorized by himself, the registration of shares which, in the ordinary course of the business of the company, have actually been placed in his name, and which were needful for his qualification.

So much for the principle. But if that be a right view of the principle, it follows that we cannot, from the mere fact of Mr. *Brown* in this case assenting on the 18th of March (for I do not think he appears to have assented earlier) to the act of the other directors in electing him a member of their body—we cannot, from that mere fact standing alone, and apart from other circumstances, infer that Mr. *Brown* on that day entered into a contract with the company to be the allottee from them of the number of shares necessary to his qualification.

But in truth this case does not at all rest on that naked state of facts; for here, as in the other cases, it does appear that shares, which we think must *primâ facie* be considered to have been taken as the qualification of Mr. *Brown*, actually passed into his name, and were duly registered in his name within a few days after he accepted the office of director. The evidence is admitted to be in such a state as to justify the inference, that, when he accepted that office of director he did intend to qualify himself, and to qualify himself by shares to be acquired in the manner in which he did acquire the shares actually registered in his name.

It appears that at this time there was a promoter named *Broomfield*, who had undertaken to float the company; to place, as it is called, the capital; and to find the directors. He had at that time claims against the company, which, as I think, we may hold were intended to be satisfied by the allotment of a considerable number of paid-up shares, his services to the company being considered to be equivalent to payment. It further appears that at a meeting on the 25th of March, at which Mr. *Brown* was not

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present, the agreement with *Broomfield* was put into a formal shape, and was to the effect that he should have for his services 5000 paid-up shares on certain special terms. The terms were, as I will assume (without deciding anything more about them), that the number of shares would be liable to be reduced if the allotment of shares to the general public should not proceed to the extent contemplated, and possibly any shares so allotted would be liable to be cancelled if the allotment fell short of what was expected. Before any large allotment, or any to the general public, was actually made, on the 29th of March, at a general meeting, at which Mr. *Brown* was not present, as in fulfilment of that agreement, 5000 shares were allotted as fully paid up to *Broomfield*, and of those 5000 shares fifty shares were substantially transferred by him to Mr. *Brown*. It is true that the form of register and transfer was not gone through, but fifty of the shares authorized to be issued to *Broomfield* under his agreement as fully paid-up shares were, by his direction, transferred to *Brown* and registered in his name, *Brown* having from the beginning contemplated qualifying himself in that manner, and not otherwise, for the office of director.

Now these shares either were or were not validly issued. If they were not, then the qualification must fail; but you cannot on that hypothesis substitute a different agreement to take a different qualification. If they were, then the qualification was good. It seems to me immaterial for the present purpose to inquire which of these alternatives is correct, for in either way we come to the result that there was really no other contract by Mr. *Brown* to qualify himself by holding shares except that which was carried into effect by means of the transaction with *Broomfield*. The appeal must be dismissed with costs.

SIR W. M. JAMES, L.J.:—

I entirely agree in the conclusion and in the reasons which the Lord Chancellor has given. I desire to add that in *Leeke's Case* (1) it certainly was not my intention, nor the intention of the Lord Justice, to overrule the decision in the *Marquis of Abercorn's Case* (2). We never even referred to it. There may be an ex-

(1) Law Rep. 6 Ch. 469. (2) 4 D. F. & J. 78.

pression, taken by itself and separate from the context, which would appear to give colour to the proposition; but I intended merely to say that becoming a director involved an agreement to have the qualifying shares. If my words will bear any other construction, it is only another instance of the inaccuracy of language to which we are all liable.

SIR G. MELLISH, L.J.:—

I am of the same opinion. In order to constitute any person a shareholder there must be proof of an agreement between him and the company that he should become a shareholder. Then the question is, whether such an agreement is proved in this case.

Now I think it is quite clear that the mere fact of being a director cannot by itself make a man a shareholder—that is to say, make an agreement between the man and the company that he will take shares from the company. The expression that he must be qualified by holding so many shares, does not oblige him to take shares from the company; but he may obtain the shares in any other legal mode by which shares may be acquired; and I think, strictly to comply with the articles of association, it would be sufficient that he should have acquired the shares before he acts as a director. If that were not so, and if the meaning of the articles of association was, that a person must have the shares before he is qualified to be a director, the consequence would be, that the election of Mr. *Brown* as a director would be wholly void. According to the ordinary understanding of mankind, it would be quite sufficient if a person acquired shares before he acted as a director; and there can hardly be any doubt that if a proposal was made to any man to become a director in the company, and if he assented to the proposal, and purchased the necessary number of shares in the market, or got a friend to transfer them to him before he acted, that would be quite sufficient qualification, and it would be impossible to infer, under the circumstances, that he had agreed to take unpaid shares and pay the calls upon them.

That being so, the single circumstance in this case from which we are asked to infer that Mr. *Brown* agreed to take shares is, that he attended that one single meeting on the 18th of March. It appears to me simply, as a question of fact, that it is impossible,

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under all the circumstances of this case, to draw that inference. I think it is tolerably clear that from the very beginning Mr. *Brown* was in fact a representative of *Broomfield*, who was to have a very large interest in the company, and it was intended from the beginning that he should qualify himself by having some of *Broomfield's* shares. It is quite possible that, though he is stated to have attended the meeting on the 18th of March as a director, yet that in fact all he did was to go there for the purpose of expressing his assent to become a director, it not appearing that he had previously assented. It was understood always by all the parties to that transaction that he was really to be qualified by receiving the shares from *Broomfield*, and that seems to be corroborated by the fact that he did not attend the other meetings at which the agreement with *Broomfield* was concluded and shares were allotted. He did not attend any other meetings until the shares were allotted to him which were intended to be *Broomfield's* shares.

I do not mean to say that, if a person assented to becoming a director, and had shares allotted to him of the number for his qualification, and for a considerable time went on and acted as a director, then you might not infer that he had agreed to accept the shares. But in this particular case it is, in my opinion, impossible to infer that *Brown* ever assented to take any other shares in the company; and to hold that he did so would be to hold that he became a shareholder contrary to his own intention.

Solicitors for the Official Liquidator: Messrs. *Vallance & Vallance.*

Solicitor for Mr. *Brown*: Mr. *T. A. Tibbitts.*

SELBY *v.* NETTLEFOLD.

L. C. and L. JJ. 1873 Nov. 22, 24.

[1872 S. 10.]

Right of Way—Grant—Obstruction—Right to deviate—Purchaser—Notice—Injunction.

The grantee of a right of way which has been obstructed by the grantor has a right to deviate over the grantor's land; and the grantee is entitled to have this right protected by the Court so long as the obstruction exists, without the necessity of proceeding against the grantor for the removal of the obstruction.

Notice of a right of way, and also of an obstruction to it, held to be notice of the grantee's right of deviation.

THIS was an appeal from a decree of Vice-Chancellor *Bacon*.

On the 27th of October, 1845, *George Selby*, the father of the Plaintiff, *George Thomas Selby*, and his trustees, purchased from *James Moilliet* a piece of land at *Smethwick*, in the county of *Stafford*, situate on the west bank of a private canal running into the *Birmingham and Wolverhampton Canal*, for the purpose of carrying on the business of a metal tube manufacturer thereon.

By an indenture of even date *Moilliet*, granted to *G. Selby*, his heirs, appointees, and assigns, and the tenants and occupiers for the time being of the last-mentioned piece of ground, the right for all purposes to go, return, and pass with barges, boats, and other things necessary for water-carriage in, through, along, and over the said private canal, and also to drive horses, mules, and other animals along and over the towing-path therein described, which was on the east bank of the canal—the opposite side to the said piece of ground—for the purpose of drawing or towing boats, barges, and other vessels along the said canal.

In the year 1870 *G. Selby* died, having devised all his real estate to the Plaintiff.

In the year 1850 *Moilliet*, who was the owner of a considerable portion of the land on both banks of the canal, built a bridge over the canal at a short distance from the piece of ground reserved to *G. Selby*, and entirely obstructed the towing-path at that part with a solid wall of brick and stone, and the road over the bridge became a public road called *Crauford Street*.

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After the obstruction, by the building of this bridge, of the towing-path, the Plaintiff's servants when engaged in towing his barges were obliged to pass round the foot of the bridge with their horses, and to cross the road so as to re-enter the towing-path on the other side of the bridge. In so doing they had to pass through part of *Moilliet's* land adjoining the road, and they continued to use this substituted way till shortly before the filing of the bill.

In the year 1853 *Moilliet* sold a piece of land on the east bank of the canal, over which the towing-path passed, to the Defendants, *J. H. Nettlefold* and *J. Chamberlain*. This piece of land included the land adjoining the bridge through which the Plaintiff's substituted way passed. The Defendants shortly after the purchase received £50 from *Moilliet* as compensation for the annoyance caused by the Plaintiff's right of way over the towing-path. It did not appear that they were aware of his having deviated over the land.

About the same time *Moilliet* sold the piece of land on the bank of the canal, on the other side of the bridge, to the *Patent File Company*, from whom the Defendants purchased it in 1870.

The Defendants had erected a wooden fence on their land on each side of *Crauford Street*, which prevented the Plaintiff's servants and horses from crossing the road; and after some correspondence the Plaintiff filed the present bill, praying that the Defendants might be restrained from obstructing the Plaintiff, or the occupiers for the time being of his said piece of land, his or their servants or agents, in his or their free use of the towing-path, and from permitting the fence to remain so as to cause such obstruction.

The Vice-Chancellor made a decree, granting a perpetual injunction in terms of the prayer, and from this decision the Defendants appealed.

It appeared, from the evidence in the cause, that *Moilliet* was only tenant for life of the land on the east side of the canal at the time of making the grant of the right of way to *G. Selby*. Evidence was also adduced to shew that the Plaintiff used the right of way very rarely, it being found more convenient to propel the barges with poles than to tow them with horses.

Mr. *Fitzjames Stephen*, Q.C., Mr. *Eddis*, Q.C., and Mr. *W. P. Beale*, for the Appellants:—

There is no authority for such a claim as this arising out of a grant of a right of way. The cases in which a right to deviate *extra viam* has been recognised have been cases of highways, or ways resting on prescription: *Absor* v. *French* (1); *Robertson* v. *Gantlett* (2); *Taylor* v. *Whitehead* (3); *Arnold* v. *Holbrook* (4); *Bullard* v. *Harrison* (5). But admitting that if a man grants a right of way, and then obstructs it, the grantee may pass through some other part of the grantor's land, that supposes that the original right of way is still in existence, and is only temporarily obstructed. Here the Plaintiff has submitted to the permanent obstruction of the original way, and has in fact abandoned it. The right to deviate is merely an excuse for trespass; it is not such a right as can grow into a permanent easement in substitution for the original right, capable of being enforced by the Court. The Plaintiff's proper remedy is to proceed against those who maintain the bridge, which the Defendants now have no power over: *Reignolds* v. *Edwards* (6); *Harrison* v. *Parker* (7); *Llewellyn* v. *Earl of Jersey* (8). The Defendants also insist on their right as purchasers without notice of the Plaintiff's alleged easement. It is true that shortly after their purchase they had notice of the Plaintiff's right of way along the towing-path, and received compensation for it, but they believed that it had been practically abandoned, and they had no notice of his claim to deviate through another part of their land. At all events, the Plaintiff has no right to pass through the Defendant's land except for the limited purpose of passing from the towing-path on one side of the bridge to the towing-path on the other side for purposes of towing.

Mr. *Kay*, Q.C., and Mr. *G. W. Lawrance*, for the Plaintiff:—

The Defendants had notice of the original right, and that implied a right to a substituted way if the original way was obstructed. There has been no abandonment of the original right. It was

(1) 2 Show. 29.
(2) 16 M. & W. 289.
(3) 2 Doug. 745.
(4) Law Rep. 8 Q. B. 96.
(5) 4 M. & S. 387.
(6) Willes, 282.
(7) 6 East, 154.
(8) 11 M. & W. 183.

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kept up by user of the substituted way: *Horne* v. *Widlake* (1); Comyns' Dig. "Chimin" (D. 2); *Payne* v. *Shedden* (2); *Lovell* v. *Smith* (3); *Harvie* v. *Rogers* (4); *Hawkins* v. *Carbines* (5). The Plaintiff does not claim a permanent right of way over the Defendant's land, but only a right of deviation so long as the original way is obstructed. There is no obligation on him to enter into litigation with those in whom the property of the bridge is vested. He is entitled to take the simplest remedy in his power.

Mr. *Fitzjames Stephen*, in reply.

LORD SELBORNE, L.C.:—

It is admitted that if *A.* grants a right of way to *B.* over his field, and then places across the way an obstruction not allowing of easy removal, the grantee may go round to connect the two parts of his way on each side of the obstacle over the grantor's land without trespass.

In this case we think the Defendants cannot be treated as purchasers either from *Moilliet* or from the *Patent File Company* without notice of the Plaintiff's rights, such as they existed when those purchases were made, and of the manner in which they were then used and enjoyed. When the first of those purchases was made the bridge and road had been actually erected by *Moilliet*, so as to obstruct the direct use of the towing-path, and we hold it to be the right conclusion from the evidence that the Plaintiff then practically enjoyed this right of way by passing over *Moilliet's* land, which was sold to the Defendants, and over the street or road and the yard on the other side from the towing-path on one side of the bridge to the towing-path on the other; and that, as against *Moilliet*, the Plaintiff in so passing and repassing was not a trespasser.

As between *Moilliet* and the Defendants, who received from *Moilliet* a money consideration in respect of their being subject to this servitude, we think it cannot be assumed that the Defendants

(1) Yelv. 141.
(2) 1 Moo. & Rob. 382.
(3) 3 C. B. (N. S.) 120.
(4) 3 Bligh, N. S. 440.
(5) 27 L. J. (Ex.) 44.

would at any time have been entitled in Equity to obstruct this substituted mode of access, so as to make it necessary for *Moilliet*, if still the owner of the road and the bridge, to remove the original obstruction, which was the *status quo* when the Defendants purchased. And that original obstruction remaining (in which the Plaintiff, having practically enjoyed the substituted mode of access till shortly before the filing of the bill, has acquiesced for a length of time, which might make it now very difficult for him in Equity to require that original obstruction to be removed), we think that the Defendants who purchased from *Moilliet* with notice, have no better right as against the Plaintiff than *Moilliet* himself would have had.

The injunction must, however, be varied by limiting it in point of duration to the life of *Moilliet*, and to the period during which the obstruction of the towing-path by the bridge may continue; and it is not to prevent the Defendants from substituting for that heretofore in use any other convenient mode of access, and it is to be stated that the order is not to extend so as to authorize the Plaintiff to use the mode of access across the Defendant's land heretofore used by him, or any other which may be substituted for it, except in and for the continuous passage along the towing-path, for the purpose of towing, from one side of the bridge to the other side thereof.

SIR W. M. JAMES, L.J., and SIR G. MELLISH, L.J., concurred.

Solicitors for the Plaintiff: Messrs. *Lawrance, Plews, & Co.*

Solicitors for the Defendants: Messrs. *Sharpe, Parkers, & Co.*, agents for Messrs. *Ryland & Martineau, Birmingham.*

L. C.
and L. JJ.
1873
Dec. 18.

STANFORD *v.* HURLSTONE.

[1873 S. 236.]

Trespass—Injunction—Timber.

5 Ch D. 155

In 1859 *H.* brought ejectment against *S.* to recover a piece of woodland. *S.* set up adverse possession for more than twenty years, and the action was discontinued. *H.* shortly afterwards took up his residence in a house close to the wood, and frequently walked in the wood, turned cattle into it, and cut the brambles there. In 1873 he cut down a tree in the wood, and threatened to cut more, upon which *S.* filed his bill for an injunction :—

Held (affirming the decision of the Master of the Rolls), that, after *H.* had, by bringing ejectment, admitted *S.* to be in possession of the wood, the acts done by *H.* must be looked upon only as acts of trespass not putting him into possession, and that *S.*, being in possession, was entitled to an interlocutory injunction to restrain him from cutting timber.

Lowndes v. *Bettle* (1) approved and followed.

THIS was a motion by way of appeal from an order of the Master of the Rolls refusing to dissolve an *ex parte* injunction.

The Plaintiff was entitled in fee to a farm at *Slaugham*, in *Sussex*, part of which consisted, as the Plaintiff alleged, of a wood called *Jenner's Wood*. This wood was bounded on two sides by the farm, on the third by a road, and on the fourth by property of the Defendant. The Plaintiff deposed that his father purchased the farm in 1828, that he succeeded to it under the will of his father, and that his father and he had been in undisputed possession of the farm, including the wood, from 1828 till 1859.

In 1859 two actions of ejectment were commenced against the present Plaintiff, Mr. *Stanford*—one by the present Defendant, Mr. *Hurlstone*, to recover one moiety of the wood, and the other by parties who claimed the other moiety. Mr. *Stanford*, at the trial of the second action in 1860, adduced evidence of adverse possession for more than twenty years, and the Plaintiffs in that action elected to be nonsuited.

The former action was not brought on for trial, but was discontinued by Mr. *Hurlstone* in 1861, and no further legal proceedings were taken.

(1) 10 Jur. (N.S.) 226; 12 W. R. 399; 33 L. J. (Ch.) 451.

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In September, 1873, the Defendant cut a gap through the fence between his property and *Jenner's Wood*, and on its being repaired by the Plaintiff's workmen, cut it through again. It was again repaired by the directions of the Plaintiff's bailiff, and again cut through by the Defendant's orders.

On the 10th of October, 1873, the Defendant applied to a sergeant in the police force to attend on his cutting a tree in *Jenner's Wood*, as he apprehended a breach of the peace. The police sergeant accordingly attended with a constable on the 13th, when two workmen, by the Defendant's orders, cut down a tree in the wood. The Plaintiff's bailiff came up, and the Defendant told him that the tree was cut as a challenge to the Plaintiff, and that he (the Defendant) would cut twenty more. The Plaintiff did not use force to prevent these proceedings, but on the 21st filed his bill praying an injunction to restrain the Defendant from cutting any timber in the wood, and from otherwise interfering with the Plaintiff's possession thereof. An injunction was granted *ex parte* on the following day.

On the 26th of November the Defendant moved to dissolve this injunction. By his affidavit filed in support of the motion, he set forth the grounds on which he alleged himself to be entitled, into which it is not necessary to enter. He further stated, that in August, 1860, he had taken into his own possession his property adjoining the wood, and had ever since resided in the cottage on that property during the whole or part of the Long Vacation in each year, and occasionally gone to it for a day or two at other times of the year; that while staying at the cottage he had continually gone into the wood and walked and sat there, especially in the heat of the summer; that he had gathered the nuts and cut pea-sticks in the wood; that he had turned his pigs into the wood to eat up the acorns, and his cows had been in the wood; that when the brambles grew thick among the underwood he had cleared them out in order that he might walk and sit more conveniently in the wood, and that during the whole of the period in which he resided at the cottage he had never been disturbed in his possession by the Plaintiff or his servants till the disturbance thereinafter mentioned. The disturbance thus referred to was the stopping up the gap made by the Defendant in

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the fence, his account of which did not materially differ from the account given by the Plaintiff's evidence, except that the Defendant stated the gap to have been made some months before September, 1873.

The Master of the Rolls refused the motion with costs, and the Defendant appealed.

Mr. *Fry*, Q.C., and Mr. *Drewry*, for the Appellant:—

Where a person who has a title enters and does acts of ownership he has such a possession as will enable him to bring an action of trespass, though he does not exclude the person on whom he enters: *Butcher* v. *Butcher* (1). We contend, therefore, that the Defendant is not to be treated as a person out of possession.

[The LORD JUSTICE MELLISH:—By the action of ejectment in 1859 the present Defendant admitted that he was out of possession, and that the present Plaintiff was in possession. After that the possession cannot be changed by such acts as the Defendant relies on.]

The Court is slow in granting injunctions to restrain trespass: *Vernon* v. *City of Dublin* (2); *Smith* v. *Collyer* (3); *Davenport* v. *Davenport* (4).

[Sir *R. Baggallay*, Q.C., referred to *Lowndes* v. *Bettle* (5).]

Sir *R. Baggallay*, Q.C., and Mr. *Currey*, for the Plaintiff, were not called upon.

LORD SELBORNE, L.C.:—

I am of opinion that a more proper order than that under appeal was never made. So far as appears on the evidence before us, the Plaintiff, supposing him to have had no other title, had in 1860 been in possession of *Jenner's Wood* for more than twenty years, and therefore, unless something could be shewn which was not shewn, he had, under the present *Statute of Limitations*, a good title in fee. In that year two actions of ejectment were brought

(1) 7 B. & C. 399.
(2) 4 Bro. P. C. Ed. Toml. 398.
(3) 8 Ves. 89.
(4) 7 Hare, 217.
(5) 10 Jur. (N.S.) 226.

admitting the present Plaintiff to be in possession. In one of those actions the Plaintiffs elected to be nonsuited, and the other action, which was brought by the present Defendant, was discontinued. The Defendant adduces evidence to shew acts of ownership by himself since that time, which might be evidence of possession if he had a title, but which, considering the evidence of his want of title, can only be treated as acts of trespass—mere acts of trespass, which could not bring the possession into controversy. The Defendant then takes upon himself to cut down a tree, calling in the police to prevent the Plaintiff from resisting the act by force. The Plaintiff properly acquiesced, and offered no forcible resistance. He thus was powerless, and the Defendant threatens to cut down more trees, and to bring a number of men for that purpose. If the Court has authority to grant an injunction, that authority ought to be exercised. Some of the cases do not appear very reasonable, but in modern times the cases in which an injunction against waste has been refused have been cases where a Plaintiff out of possession asked for an injunction against a Defendant in possession. We need not consider whether in all those cases the Court exercised a sound discretion, if the matter is one of discretion. It is enough to say that in *Lowndes* v. *Bettle* (1) a very learned and careful Judge held that, in circumstances closely resembling those of the present case, an injunction could be granted, and we have much satisfaction in following his decision.

SIR W. M. JAMES, L.J., and SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Senior, Attree, & Johnson;* Mr. *George Dobree.*

(1) 10 Jur. (N.S.) 226.

L. C. and L. JJ.
1874
Jan. 14, 15.

CLARK *v.* SCHOOL BOARD FOR LONDON.

[1873 C. 126.]

School Board—Building—Compensation—Injuriously affected—Elementary Education Act, 1870 (33 & 34 *Vict.* c. 75), *ss.* 19, 20.

A School Board, taking lands under the *Elementary Education Act*, 1870, need not give notice to treat to the owners of easements over the land taken; but compensation in respect of such easements is to be given as for land injuriously affected.

Decision of *Malins*, V.C., reversed.

THE School Board for *London* had, under the powers of the Act 33 & 34 Vict. c. 75, purchased land adjoining certain small houses which *J. H. Clark*, the Plaintiff in this case, held for the twelve years' residue of a long term. The School Board proceeded to build schools on the land so purchased, which schools would interfere with ancient lights in the Plaintiff's houses, and the Plaintiff filed the bill in this suit to restrain the building of the schools.

The Vice-Chancellor *Malins* granted an injunction accordingly, and the Defendants moved by way of appeal to discharge the order. The motion came before the Lords Justices on the 19th of July, 1873, when they directed it to be turned into a motion for a decree, and to come before the Lord Chancellor and Lords Justices.

The School Board, in August, 1873, obtained from Parliament powers to take the Plaintiff's houses under the compulsory clauses of the *Lands Clauses Consolidation Act*. Proceeding under these clauses, they paid the purchase-money into Court, gave the usual bond, and took possession of the houses. The Master of the Rolls, sitting as Vacation Judge, then dissolved the injunction, and the motion for decree now came on to be heard for the sole purpose of deciding whether the bill had been properly filed, and, consequently, how the costs of the suit were to be borne.

Mr. *Glasse*, Q.C., and Mr. *F. A. Lewin*, for the Plaintiff:—

The question depends entirely upon the construction to be put upon two sections of the *Elementary Education Act* (1). The

(1) 33 & 34 Vict. c. 75:—

Sect. 19. "Every school board for the purpose of providing sufficient public school accommodation for their district, whether in obedience to any requisition or not, may provide, by building, or

Defendants say that they are empowered to block up our lights, giving us compensation, under sect. 68 of the *Lands Clauses Consolidation Act*, as for lands injuriously affected: *Hutton* v. *London and South-Western Railway Company* (1). But that clause is not incorporated into the *Elementary Education Act*, the only clauses incorporated being those which relate to the purchase of land. No part of our land has been taken, and we therefore cannot come under the clauses as to land injuriously affected. There is no clause like sect. 6 of the *Railway Clauses Consolidation Act*, enabling the Board to build schools and compensate any one who is injured. They have no more power to injure their neighbours than any other landowner has: *Wells* v. *Ody* (2); *Dawson* v. *Paver* (3). They were not obliged to build on this piece of land, nor on this part of it: *Leader* v. *Moxon* (4), which is cited in *Reg.* v. *St. Lukes* (5). The Act only applies to land which they have, after following certain forms, power to purchase; as to all other land, they are like ordinary proprietors.

Mr. *Cotton*, Q.C., and Mr. *Speed*, for the School Board:—

By our Act we are enabled to give compensation to any one whose land is injuriously affected by our buildings, and that proceeding was substituted for an action: *Reg.* v. *St. Lukes* (6).

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otherwise, school-houses properly fitted up, and improve, enlarge, and fit up any school-house provided by them, and supply school apparatus and everything necessary for the efficiency of the schools provided by them, and purchase and take on lease any land, and any right over land, or may exercise any of such powers."

Sect. 20. "With respect to the purchase of land by school boards for the purposes of this Act, the following provisions shall have effect (that is to say):—

(1.) The *Lands Clauses Consolidation Act*, 1845, and the Acts amending the same, shall be incorporated with this Act, except the provisions relating to access to the special Act; and in construing those Acts for the purposes of this section, the special Act shall be construed to mean this Act, and the promoters of the undertaking shall be construed to mean the School Board, and land shall be construed to include any right over land."

By other sub-sections the School Board was required before taking any land to publish certain notices and to obtain the authority of the Education Department of the Privy Council.

(1) 7 Hare, 259.
(2) 1 M. & W. 452.
(3) 4 Railw. Cas. 81.
(4) 2 W. Bl. 924.
(5) Law Rep. 7 Q. B. 148, 156.
(6) Law Rep. 6 Q. B. 572; Ibid. 7 Q. B. 148.

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We have not exceeded the powers given by our Act, and the Plaintiff has no right to come to this Court. We offered compensation, and offered to buy the Plaintiff's land; but he asked a price which was much too high. A duty is imposed on us by the Legislature, and in order to discharge it we have power to take such land as we want, and to compensate the owners of such land as we may require. In no other way can we discharge our duty. We could not take the Plaintiff's land under the compulsory clause, as we did not want it: *Galloway* v. *Mayor, &c., of London* (1). In *Broadbent* v. *Imperial Gas Company* (2) there was an express provision that no nuisance was to be created.

Mr. *F. A. Lewin*, in reply:—

20 Eq 357

Under sect. 20 of the Act the School Board have clearly power to buy compulsorily any "right over land." We say that they ought to have proceeded under those powers, and to have bought up our right. As they did not they have acted illegally, and must take the consequences.

LORD SELBORNE, L.C.:—

The question which has been argued here is one of considerable importance, and therefore we think it right to express our opinion upon it.

20 Eq 358

It seems to me that the Legislature, in authorizing the School Board, for important public purposes, to exercise these large powers subject to the supervision and authority of the Department of the Privy Council for Education, meant to give them a discretion suitable to the nature and importance of the duties to be discharged by them. Those duties require that the persons entrusted with them should provide what, in their honest judgment, would be proper and suitable accommodation for the instruction of the children to be educated in the buildings to be erected upon the land acquired by them. And, compulsory powers to take land for these public purposes being given, if they do not provide what a higher authority considers sufficient school accommodation, they may be required to provide more.

(1) 2 D. J. & S. 213. 10 Jur. N.S. 552. (2) 7 D. M. & G. 436. 3 Jur. N.S.

I cannot but think that the Legislature intended the School Board to have the full benefit of all the provisions connected with the compulsory clauses in the *Lands Clauses Consolidation Act*, so that they might, according to their judgment and discretion (acting *bonâ fide*), erect such buildings on such a space of ground, of such magnitude, and so situated on any lands acquired by them, as they might think proper for the public trust with which they have been charged. And, as it appears to me, that view is confirmed, not only by the general provisions of the Act and by the particular provisions of sect. 19, but also by the express words which are found in sect. 19 and are repeated in sect. 20. It is enacted by sect. 19 that, for the purpose of the building so to be erected by them, they shall have power to purchase not only the land, but any rights over land. And in sect. 20 it is said that the word "land" shall, within the meaning of this section, be construed to include "any right over land."

These are very large powers; and they appear to me to shew that the intention of the Legislature was to give the land which is required to the School Board absolutely free from any *jus tertii* which would control their dominion over it for the purpose of the duty which they have to discharge. The right as against a man's neighbour which he acquires by reason of the possession of ancient lights imposes a servitude upon the land of that neighbour; and, for that reason, cannot be acquired without grant or twenty years' user. It is therefore strictly within the meaning of those words, "right over land," and is, in that respect, just like a right to a watercourse, or a right of way over land.

In my opinion this is about the largest expression that could have been used, if the object of the Legislature was that unrestricted dominion over the land might be absolutely acquired for the public service. If so, of course the rights of any one who is interfered with must be the subject of compensation under the Act; and the sole question is as to the mode in which that compensation is to be given; that is to say, whether the introduction of these words "any right over land" makes it necessary for the Board to give notice to purchase the right, whenever there should be an interference with any servitude of this description; or whether the compensation is to be obtained under those provisions of the

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Lands Clauses Act which deal with persons whose lands are not taken, but are injuriously affected.

In my opinion the sound view is, that the application, according to the nature of the subject-matter, of the different compensation clauses of the *Lands Clauses Act*, is not meant to be altered by the definition in the special Act, that in the word "land" is included "any right over land," or by the express enactment that the compulsory powers are to extend to rights over land. The general Act contains a scheme of provisions working out the right to compensation, and that scheme of provisions varies according to the subject-matter. In some clauses it is provided that when land is to be taken notice is to be given, and, if that notice is given, then there is a right to enter upon the land, and no injunction can be granted; but if there is an attempt to enter without notice, and without taking the proper steps, then an injunction may be granted.

The interference with ancient lights is not a thing which is capable of being "entered upon." The word "entering" is inapplicable to it, and therefore such a section as the 85th is inapplicable to this case. But there are other cases mentioned in the Act, in which compensation is to be made, such as the case in which no agreement has been arrived at, though an injurious act is proposed to be done upon lands not taken. These provisions in the Act seem to be applicable to a case of this kind; and the more so, because in many such cases, until the thing is done, it cannot be known how far the land will be injuriously affected, so as to be the subject of compensation. I am glad to find that in coming to this conclusion we are not without authority. The case of *Macey* v. *Metropolitan Board of Works* (1) seems in that respect to be on all fours with the present case. There the *Thames Embankment Act*, by a definition clause similar to that which we have to construe here, says that the word "lands" is to be construed to include easements and rights over land. In the execution of the works, the Metropolitan Board of Works proceeded to fill up the river in front of the Plaintiff's wharf, and it was found that he would lose a very valuable right over the land in front of his wharf. He insisted that they should have given notice of

(1) 33 L. J. (Ch.) 377; 10 Jur. (N.S.) 333.

their intention by purchase to acquire his easement. But it was held that he was wrong; that their right to enter and execute the works was not in abeyance till they had done that act; and that the nature of his right was such, that the proper compensation clauses applicable to it were those which related to persons whose lands were injuriously affected, and not those which related to persons whose lands were purchased under what we may call the purchase clauses. That is an authority which appears to be consistent with common sense, and from which I, for my part, do not differ.

That disposes of the right of the Plaintiff (if this case had been brought to a hearing without the intervention of an Act of Parliament altering the position of the parties) to maintain the injunction he had obtained, and to obtain a decree. But it seems to us, looking at everything that has passed, and at the fact that this is an important general question, the decision of which may to some extent affect other cases; and also to the special form of this Act, and of the clauses which we have to construe, that we shall not do wrong in dismissing the bill without costs.

SIR G. MELLISH, L.J.:—

I am entirely of the same opinion. During the argument I for some time thought it doubtful whether, according to the true construction of the Act, the meaning was not that the School Board were to purchase all such land as would enable them to build their school without interfering with the rights of any third persons.

But I am satisfied that there is no ground for that opinion. I think that they are only required, and indeed authorized, to purchase that quantity of land which they want for the purpose of building the school-house, including, of course, the house which they are bound to have for the master and a play-ground.

It would have been rather an extraordinary thing, considering that the site and school are to be paid for by the ratepayers, if Parliament had made it necessary that a larger quantity of land should be purchased than was really necessary for the purpose for which it was required. I think, therefore, that they were not authorized, and had no compulsory power, properly speaking, to purchase any land except that land which might really be required

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for the purposes of their new buildings. That seems to be made clear by those words which were pressed so much upon us, namely, "any right over land," because what the 19th section says is, in effect, that if the Board wants to erect a school they may purchase land; and then, in order that they may be perfectly unfettered in building the school, that they may purchase any right which any third person has over that land. If the man who owns the land will not sell it, or the man who owns the right over it will not sell it, then in order to enable the Board to proceed, the next section gives compulsory powers, and incorporates the various clauses of the *Lands Clauses Consolidation Act*, and says that land shall include any right over land. I cannot help thinking that they can take under the compulsory powers, not only the land itself, but any right over land—that is, any easement which any third person has; and, if it is necessary, then they are to acquire that right for the purpose of building the school. There is merely a difference in the forms that are to be adopted for the purpose of getting compensation, and by the terms of the *Lands Clauses Act* this is to be treated as land which has been injuriously affected.

SIR W. M. JAMES, L.J.:—

The bill will be dismissed without costs, and the deposit returned.

Solicitors for the Plaintiff: Messrs. *Lewin & Co.*
Solicitors for the Defendants: Messrs. *Sydney Gedge & Co.*

Ex parte MACKAY. *In re* JEAVONS.

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1873
Dec. 19.

Bankruptcy—Appeal—Re-hearing by Registrar—Practice.

A Registrar sitting as Chief Judge may re-hear a case, although his order has been appealed from and varied by the Court of Appeal, if the special point to be re-argued was not dealt with on the appeal.

IN this case an application had been made by the trustee in the liquidation to Mr. Registrar *Spring Rice*, sitting as Chief Judge, for a re-hearing; but he declined to re-hear the case without the direction of the Court of Appeal.

The debtor, *J. Jeavons*, before the liquidation, executed three indentures, dated respectively the 30th of March, 1870, by the first of which he assigned a patent for making iron armour plates, and the royalties payable thereon, to certain of his creditors; by the second he assigned his interest in the *Millwall Ironworks*, which were held by him under an agreement for a lease, together with the machinery and trade fixtures, to the same creditors; and by the third he agreed to give a bill of sale to the same creditors of certain chattels and effects, not being trade fixtures. Neither of those deeds was registered under the *Bills of Sale Act*. The Registrar made an order declaring that the creditors were entitled to a charge on the machinery, engines, and plant in the nature of trade fixtures, and on the royalties under the patent, but refused to make any order as to the chattels included in the third indenture, on the ground that it ought to have been registered under the *Bills of Sale Act*. This order was appealed from, and was reversed as to the royalties under the patent, but affirmed as to the rest of the order. On that occasion it was assumed by the counsel both for the trustee and for the creditors, that the assignment of the machinery and other trade fixtures attached to the leasehold premises did not require registration under the *Bills of Sale Act*, and the point therefore was not brought to the attention either of the Registrar or of the Court of Appeal; but subsequently to the decision of the Court of Appeal, the case of *Ex parte Daglish* (1) was decided, by which *Boyd* v. *Shorrock* (2) was over-

(1) Law Rep. 8 Ch. 1072. (2) Law Rep. 5 Eq. 72.

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ruled, and it was held that where trade fixtures are included in a demise of leasehold premises, the deed requires registration as a bill of sale. The trustee accordingly applied to the Registrar to re-hear the case on this point.

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the trustee, now mentioned the case to the Court of Appeal.

LORD SELBORNE, L.C.:—

We think that the Registrar may exercise his discretion to re-hear the case, and deliver his judgment thereon, notwithstanding the previous appeal.

Solicitors for the Trustee: Messrs. *Lewis, Munns, & Longden.*

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SYNGE *v.* SYNGE.

[1872 S. 121.]

Will—Election.

A testatrix advanced to the Defendant £900 on the security of an assignment by him of a covenant by *F.* to transfer a sum of £1000 stock, and to pay interest in the meantime. By her will she gave *F.* £3000, and all sums due to her from him, and directed her executors not to require payment of the £900 due from the Defendant, but out of the £3000 given to *F.* to retain enough to purchase £1000 stock for the benefit of her estate, and if the stock were worth more than the £900 and interest, the surplus to be paid to the Defendant. *F.* having predeceased her, she, by a codicil, directed that the £3000 should form part of her residuary personal estate, but directed her executors not to call on *F.'s* representatives for transfer of the £1000 stock, nor to enforce payment of the £900 from the Defendant:—

Held, that the Defendant was not at liberty to enforce performance of the covenant to transfer the £1000 stock against *F.'s* estate, except as to the difference between the £900 and the value of the stock.

Decision of *James*, L.J., for *Wickens*, V.C., varied.

THIS was an appeal from a decision of Lord Justice *James*, acting for Vice-Chancellor *Wickens*, on a special case (1).

The facts stated in the special case are given at length in the

(1) Law Rep. 15 Eq. 389.

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previous report. The following short statement will be sufficient for the purpose of the present report:—

By an indenture dated the 23rd of April, 1858, between *Francis H. Synge* of the one part, and the Defendant, *Millington H. Synge*, of the other part, *Francis H. Synge*, for the considerations therein mentioned, covenanted with the Defendant that within twelve months after the death of Sir *J. M. Tylden* he would transfer £1000 £3 per Cent. Reduced Annuities into the name of the Defendant, his executors, administrators, or assigns, and would in the meantime pay interest at the rate therein mentioned.

By an indenture dated the 8th of March, 1866, between the Defendant, *M. H. Synge*, of the one part, and *Mary A. Synge*, of the other part, in consideration of £900 lent by *Mary A. Synge* to the Defendant, the Defendant assigned to her the indenture of the 23rd of April, 1858, and the principal and interest thereby secured, with full power to receive and demand the same in the name of the Defendant, and give discharges for the same; subject to redemption on payment of the sum of £900 and interest.

Mary A. Synge made her will, dated the 8th of September, 1871, in which she bequeathed as follows:—"To my late husband's nephew, *Millington H. Synge*, thirty-six B shares in the *Weston-super-Mare Gas Company*. To my late husband's nephew, *Francis H. Synge*, £3000, and all such sums of money (if any) as he may be indebted to me at the time of my death except as hereinafter mentioned." And the testatrix directed that in case any pecuniary legatee should die before her, his or her legacy should not lapse, but be paid to his or her personal representatives as part of his or her personal estate. The will then, after reciting the indentures of the 23rd of April, 1858, and the 8th of March, 1866, proceeded as follows:—"Now I do hereby will and direct that if at my death the sum of £900 and its interest so secured to me by the said indenture of the 8th of March, 1866, or any part thereof, shall still be due to me, and if the aforesaid covenant on the part of the said *Francis H. Synge* contained in the indenture of the 23rd of April, 1858, shall be still unperformed, my executors shall not require payment of the said sum of £900 from the said *Millington H. Synge*, but they shall retain

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out of the legacy of £3000 bequeathed by me to *Francis H. Synge* so much as should be sufficient to purchase for the benefit of my estate the sum of £1000 Reduced £3 per Cents., and the costs attending such purchase, and such purchase when made shall be in satisfaction of the aforesaid covenant of *Francis H. Synge;* and if the said £1000 stock shall be worth more than the said debt of £900 and the interest then due thereon, the surplus shall be paid to the said *Millington H. Synge* by my executors."

F. H. Synge died on the 17th of September, 1871, having by his will given all his real and personal estate to his widow, and appointed her sole executrix. By a codicil dated the 30th of October, 1871, the testatrix made the following disposition:— "Whereas since the date of my will *Francis H. Synge* has died, Now I hereby declare that notwithstanding anything contained in my will to the contrary, the legacies bequeathed to him shall not go to his representatives, but shall form part of my residuary estate, subject to payment of debts and other legacies. I will and direct that my executors shall not call upon the representatives of *Francis H. Synge* for payment of any moneys or for the transfer of any stock pursuant to the deed of covenant of the 23rd April, 1858, nor enforce payment by *Millington H. Synge* on the security of the deed of 8th March, 1866."

The market value of the £1000 £3 per Cent. Reduced at the date of the will was £915 12*s.* 6*d.*; at the date of the codicil, £911 13*s.* 4*d.*; at the date of the testatrix's death, £910 12*s.* 6*d.*

The Defendant claimed to take the benefit of the forgiveness of the debt of £900 and the share legacy, and to enforce the covenant against *Francis H. Synge's* estate; but if put to election, he elected to take under the will. The Plaintiff was the executrix of *F. H. Synge,* and the questions submitted to the Court were, whether *Millington H. Synge* was entitled to enforce the covenant to any and what extent, and whether the Plaintiff was entitled to have the deed of covenant delivered up.

The Lord Justice *James* decided that the Defendant, *M. H. Synge,* could not enforce against the executrix of *Francis H. Synge* the covenant in respect of the sum of £1000 £3 per Cent. Reduced Annuities, or any part thereof, and answered the questions accordingly. From this decision the Defendant appealed.

Mr. *Dickinson*, Q.C., and Mr. *Cookson*, for the Appellant:—

This is not a case of election, for the testatrix has not assumed to give anything which was not her own. It simply depends on the construction of the will, and we say it is plain that the object of the codicil was to release both the Defendant and the executors of *F. H. Synge* so far as her estate was concerned, but she had no intention to alter the relations between them. When she made her will she had an intention of benefiting *F. H. Synge* and his representatives, but she altered her mind and withdrew her bounty. If she had intended to prevent the Defendant from enforcing the covenant she might have done so, but she has only directed her own executors not to enforce it, and has left the Defendant at liberty. At all events the Defendant is entitled to recover from the estate of *F. H. Synge* the difference between the sum of £900 and the value of the £1000 stock.

Mr. *Hemming*, for the Plaintiff, was desired by the Court to confine himself to the last point raised by the Appellant:—

The testatrix considered herself the owner of the whole stock because she had advanced what was substantially the whole value of it. But in fact she disposed of what was not entirely her own, and so raised a case of election. The effect of the will and codicil taken together is, that the testatrix, by releasing both the covenant and the debt, intended entirely to extinguish the debt and to prevent the Defendant from enforcing the covenant as to any part of it. It is not necessary, in order to raise a case of election, that there shall be express words of intention to do so; but the Court will take the natural construction of the will: *Wilkinson* v. *Dent* (1).

LORD SELBORNE, L.C:—

It appears to me that the decision of Lord Justice *James*, sitting for Vice-Chancellor *Wickens*, is substantially correct; but I think that it needs some alteration so as to make a distinction between the sum of £900 and the difference between that sum and the value of the stock.

The testatrix in her codicil takes notice of the death of *Francis*

(1) Law Rep. 6 Ch. 339.

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H. Synge since the date of the will, and explains how she means the will to operate with regard to that event; she directs that, on the one hand, his representatives are not to take the £3000, as they would have done under the provision in the will against lapse; but that, on the other hand, her executors are not to enforce the payment of so much of the debt as was hers either against *Francis H. Synge's* representatives or against the Defendant, *Millington H. Synge*. It appears to me that the one release was intended to be connected with the other, and not to be independent of it. She did not mean to release the security altogether, but only to the extent of the bounty which she intended for *Francis H. Synge*. The Defendant was to be in the same position under the codicil as under the will; and although the testatrix had in the will taken express notice that there might be a surplus to which she did not refer in the codicil, yet there is in the codicil no indication of any change of purpose as to that. When she said, "My executors shall not call upon the said *F. H. Synge* for the payment of any moneys or for the transfer of any stock pursuant to the deed of covenant of the 23rd April, 1858," she must have had in her view the measure of the rights which were vested in her, and she did not, in my opinion, mean to deal with any beneficial interest except her own.

The answer to the special case must, therefore, be varied by declaring that the debt of £900 must be declared satisfied, but that the Defendant is entitled to enforce against *Francis H. Synge's* executors the performance of the covenant to the extent of the difference between the sum of £900 and the value of the £1000 stock at the date of the death of the testatrix. We think there should be no costs of the appeal.

SIR G. MELLISH, L.J.:—

I am of the same opinion. There is no real difficulty about the construction of the will. A legacy of £3000 is left to *Francis H. Synge*, from which £900 is to be deducted, not for the benefit of the Defendant, but for the benefit of the estate of the testatrix. But by the will it is provided that if there is any surplus of the sum of £1000 stock after payment of the £900, the Defendant is to have it. What, then, is the meaning of the codicil? The tes-

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tatrix, bearing in mind that on her death her representatives would be entitled to sue *Francis H. Synge's* executors for the purpose of recovering £900 out of the £1000 stock, says: "I will and direct that my executors shall not call upon the representatives of *Francis H. Synge* for payment of any moneys or for the transfer of any stock pursuant to the deed of covenant of the 23rd April, 1858." Was that said for the benefit of the representatives of *Francis H. Synge* or of the Defendant? It appears to me that the testatrix, having substantially the right of suing vested in her, means that the obligation due to her from *Francis H. Synge* shall not be sued for at all; not that her representatives should not sue, but that the Defendant might sue.

Then I agree with the Lord Chancellor that we cannot infer that she intended to alter the Defendant's rights or to dispose of any other property but her own. The Defendant must be therefore at liberty to sue for the difference between the sum of £900 and the value of the stock.

Solicitors: Mr. *Mossop*; Mr. *Osborn Jenkyn*.

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1873
Dec. 19.

Bankruptcy—Debtor Summons—Bankruptcy Act, 1869, *ss.* 9, 13—*Petition for Adjudication—Receiver—Payment of Debt to Petitioner.*

A creditor sued out a debtor's summons, and the debt not having been paid or secured, he presented a petition for adjudication, and got a receiver appointed. Soon afterwards the debtor, with the consent of the receiver, paid part of the debt to the creditor, and the creditor accordingly withdrew the petition for adjudication. The debtor had been adjudged bankrupt on the petition of another creditor after the part payment:—

Held, that the receiver was a trustee for all the creditors, and had no right to permit the payment to be made to the creditor who sued out the debtor's summons, and that the money must be paid over to the trustee in the bankruptcy.

THIS was an appeal from an order of Mr. Registrar *Spring Rice*, sitting as Chief Judge in Bankruptcy.

On the 3rd of October, 1872, *G. H. Jay*, a creditor of the bankrupt, *Henry Powis*, a fringe manufacturer, for £3000, sued out a

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debtor's summons against him. The debtor not denying the debt, and having failed to pay or to secure or compound the same, *Jay* presented a petition for adjudication against him on the 12th of October. On the same day *Jay* applied for and obtained the appointment of a receiver under the 13th section of the *Bankruptcy Act*, 1869. It was stated in the affidavit in support of the application, that the debtor was being sued by other creditors, and that in one of the actions the creditor was in a position to sign judgment and issue execution in the course of a day or two.

In this state of things the debtor entered into negotiations with *Jay* for the settlement of his debt, and on the 15th of October he paid *Jay* £1050, and gave him bills for the rest of the debt. This payment was made with the knowledge and consent of the receiver.

On the 24th of October a petition for adjudication was presented by another creditor, upon which *Powis* was adjudicated bankrupt on the 6th of November, and a trustee was appointed. An order was afterwards made by consent under *Jay's* petition that the trustee should be associated with the receiver, and that all moneys then in the receiver's hands, and also the sum of £1050 now in dispute, should be paid into their joint names.

On the 6th of December *Jay's* petition was dismissed on his application, without prejudice to any order which had been made under the adjudication.

Under these circumstances, the Registrar, sitting as Chief Judge, made an order in the bankruptcy declaring that the payment of the sum of £1050 to *Jay* was fraudulent and void as against the trustee, and directing that sum to be paid to the trustee with interest at £4 per cent. From this order *Jay* appealed.

Evidence was adduced to shew that the sum of £1050 was paid out of money received from an insurance office on a fire policy, on which *Jay* claimed a charge, but the Court did not consider that the charge was established.

Mr. *Little*, Q.C., and Mr. *Winslow*, for the Appellant:—

The proceeding by debtor summons is a special process created by Act of Parliament, and was substituted for the writ of *ca. sa.* when that was abolished by the *Bankruptcy Act*, 1869. Its main

object was to give the creditor a speedy way of forcing the debtor either to give security or to pay the debt. The debtor and creditor can come to terms at any stage of the proceedings, and if the debt is ultimately paid, and the petition for adjudication withdrawn, no other creditor can carry it on, and the act of bankruptcy committed on the debtor's summons is not such an act of bankruptcy as can be the foundation of a second petition by another creditor: *Ex parte Wier* (1). The creditor is therefore *dominus litis*, and the receiver appointed by the Court is his trustee, and not the trustee for the general body of creditors. This is shewn by the 93rd and 94th sections of the *Bankruptcy Act*, 1869, when compared with the 133rd, 184th, and 194th sections of the *Bankruptcy Consolidation Act*, 1849.

[The LORD CHANCELLOR referred to the 104th rule of the *Bankruptcy Rules*, 1870, and the 13th Form appended to the Rules.]

If the creditor had applied to have the receiver discharged, this must have been done, and then the debtor might without question have made the payment complained of. It is therefore at most a question of regularity in form.

Mr, *De Gex*, Q.C., and Mr. *Finlay Knight*, for the trustee, were not called on.

LORD SELBORNE, L.C.:—

I entertain no doubt upon this case. In my opinion no greater mischief could be done by those who have the administration of bankruptcy than by their permitting such a transaction to stand as that which has taken place in the present case—assuming, as I do, that no fund to which Mr. *Jay* was equitably entitled has been identified. It is practically admitted—I think that, upon the evidence, it could not but be admitted—that no fund has been identified. Therefore we must take this as a simple payment, and the matter stands thus: A gentleman, who I agree, under the *Bankruptcy Act*, 1869, was the only person to prosecute the adjudication, had presented a petition to make his debtor a bankrupt, and

(1) Law Rep. 6 Ch. 875.

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having done that, he gets the appointment of a receiver, which appointment, according to general principles, and according to the express language of the 104th rule and the 13th form, is an appointment of a man who, on being appointed, becomes an officer of the Court—who is not to part with any portion of that which he does receive except under the direction of the Court—who is to account to the Court for what he receives, and under the rules of the Court (if while he continues in existence as an officer of the Court an adjudication takes place) is to account to the trustee who may be appointed under that adjudication in bankruptcy, and to attend upon him as may be necessary for the purposes of the bankruptcy. And, in principle, it is equally clear that so strong and special a power as that of appointing a receiver (which may be accompanied by an injunction also to prevent other creditors from obtaining payment of their debts before an actual adjudication) if exercised by the Court can only be exercised in the prospect of and with a view to a future adjudication for the benefit of all the creditors. I do not at all dispute that, consistently with that, the creditor who was at that time the sole petitioner, and who obtained the appointment of the receiver, might have gone to the Court of Bankruptcy and said that he had settled with the debtor and that nobody else had taken any proceedings and might have applied that his petition might be dismissed, and that the order for the receiver might be discharged, and the receiver himself discharged, and authorized to pay over to the debtor, or in such manner as the debtor and creditor might agree, the money in his hands; and if the Court, upon all the facts known to it, thought that the proper order to make, and did make it, from and after the date of such order there would no longer be any receiver, and the receiver would be justified in dealing with the moneys in his hand as the Court, by the order discharging him, might have directed. But nothing of that kind was done in the present case. The receiver was appointed, and came under the ordinary obligations of a receiver; every part of the fund was or ought to have been received by the receiver, and I greatly doubt whether, upon the facts which appear, we ought not to regard it as having been actually under his control; but, whether that was so or not, it is manifest that the receiver was an assenting party to what was done

with it. Then, without any authority of the Court, without any accounting to the Court, and in fraud, as it appears to me, of the general creditors, if before the receiver was discharged any adjudication should take place on the petition either of that or of any other petitioner, this money was applied for the benefit of the particular creditor. It is said that there was an agreement between the creditor and the debtor that the creditor would take steps to dismiss his petition and discharge the receiver, which was not actually done until a month after, when bankruptcy had completely taken place. I do not think it is satisfactorily proved that there was such an agreement at the time this payment was made; but if there had been, in my judgment it would make no difference, because as long as the receiver existed he existed as an officer of the Court for the benefit of all creditors. If an adjudication should take place before he was discharged—and an adjudication did take place in this instance before he was discharged—the payment, in my judgment, was in fraud of the Court; and understanding the learned Registrar to have proceeded upon that view, I entirely concur in his judgment. This appeal will be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am entirely of the same opinion. It is a matter of considerable importance that creditors should understand that if they not only take out a petition in bankruptcy against their debtor, but obtain the appointment of a receiver, they do that for the benefit of all the creditors. It may be that if no other creditor comes forward, and there is no other act of bankruptcy, he may obtain the discharge of that receiver. I entirely agree that so long as the receiver exists all the funds of the bankrupt ought to be paid to him, and that the particular creditor has no right to intercept the funds and prevent their being paid to the receiver.

Solicitors for the Appellant: Messrs. *Lewis, Munns, & Longden.*
Solicitors for the Respondent: Messrs. *Wild, Barber, & Browne.*

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Dec. 5.

Ex parte EDWARDS.

Church Discipline Act (3 & 4 *Vict. c.* 86)—*Clerk in Holy Orders—Commission of Inquiry—Status of Applicant—Bishop.*

4 QBD 534
546,574

The bishop is not, before issuing a commission of inquiry into charges against a clerk in holy orders, obliged to hear objections against the person who has made the application to the bishop.

Quære, whether the bishop has a discretion, on account of the character of the promoter, to refuse to issue a commission of inquiry.

Order of *Bacon*, V.C., affirmed.

THE Rev. *John Edwards*, Vicar of *Prestbury*, received, in April, 1873, from the Bishop of *Gloucester* and *Bristol*, a bill of presentment, signed by *Charles Combe*, tailor, and *Joseph Etheridge*, yeoman, denouncing certain acts said to have been illegally done by the vicar in the church of *Prestbury*.

The vicar, on the 25th of May, entered a caveat in the Consistorial and Episcopal Court of the Bishop of *Gloucester* and *Bristol* as to any proceedings which might be taken against him, and in support of the caveat he filed an affidavit that *Combe* and *Etheridge* habitually attended a chapel of Independents, and that the proceedings were not in fact promoted by them, but by a body called the Church Association.

The proctors of Mr. *Edwards*, on the 16th of July, applied to the bishop to be heard in support of the caveat, and also in opposition to the sending of the case to the Court of Arches. Mr. *Edwards* was then informed by the bishop's secretary that the bishop had decided to issue a commission.

On the 5th of November the bishop gave notice to the vicar that, proceeding on the application of *Charles Combe* under the Act 3 & 4 Vict. c. 86 (1), it was the intention of the bishop, at

(1) 3 & 4 Vict. c. 86, s. 3: "And be it enacted, That in every case of any clerk in holy orders of the United Church of *England* and *Ireland* who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit, of his own mere motion, to issue a commission under his hand and seal to five persons, of whom one

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the expiration of fourteen days, to issue a commission for the purpose of making inquiries into the grounds of certain specific charges as to the manner in which the vicar had officiated in divine service.

A statement of objections to the issuing of the commission was then filed by the vicar, and he demanded to be heard on his statement of objections. The objections were, that *Charles Combe* was a Dissenter; that his application was not *bonâ fide;* and that it was an unlawful transaction amounting to maintenance.

The bishop appeared to have refused to hear the objections, and on the 27th of November issued, on the application of *Charles Combe,* a commission of inquiry under the Act 3 & 4 Vict. c. 86. The commissioners appointed under the commission gave notice to the vicar that they intended to hold a meeting on the 8th of December.

Mr. *Edwards* then moved before the Vice-Chancellor *Bacon* that the bishop, the commissioners, and *Charles Combe,* might be prohibited from proceeding until the bishop had heard and determined the objections.

The Vice-Chancellor *Bacon* refused to issue the prohibition, and Mr. *Edwards* now, by way of appeal, renewed the motion.

Dr. *Stephens,* Q C., and Mr. *Phillimore,* in support of the application:—

We have a right to question the *status* of the promoter, and to shew that his proceedings are not *bonâ fide,* and are merely for the purpose of annoyance. Otherwise, why is the fourteen days' notice to be given to the party accused, and why are the names, addition, and residence of the parties making the application to be given? We claim to be heard on the question by counsel before

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shall be his vicar-general, or an archdeacon or rural dean within the diocese, for the purpose of making inquiry as to the grounds of such charge or report: Provided always, that notice of the intention to issue such commission under the hand of the bishop, containing an intimation of the nature of the offence, together with the names, addition, and residence of the party on whose application or motion such commission shall be about to issue, shall be sent by the bishop to the party accused fourteen days at least before such commission shall issue."

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the bishop. A promoter in such a case must be a proper person: *Martin* v. *Mackonochie* (1); and the question can only be raised now, for we cannot raise the question before the commissioners. We have a right to shew that the promoter is a person from whom we shall not be able to recover our costs. This is an ecclesiastical question, and the Ecclesiastical Court never did anything without hearing both sides: *Maidman* v. *Malpas* (2). It is true that there is no express direction in the Act, but a Judge in such a case has general power to do what is right.

LORD SELBORNE, L.C.:—

This application appears to me to be quite unfounded, and absolutely frivolous. The statute imposes upon the bishop the duty of issuing, in what he may consider a proper case, a commission of inquiry; and, in the language of the statute, he may do so either upon the application of any party complaining of an offence alleged to have been committed, or, if he shall think fit, on his own mere motion.

I have a very serious doubt whether it would be competent for the bishop to refuse to entertain and consider an application from any party; because the statute says, that any party who thinks fit to complain may make the application. But doubtless, it is for the bishop to exercise a discretion whether he will or will not issue the commission, either when he has received the application from any party, or when he might do so upon his own motion.

The present application asks the Court to restrain the bishop from doing the very thing which the statute gives him jurisdiction to do, on the ground that he has not done something else which the statute does not directly or indirectly make it his duty to do. The statute nowhere requires certain conditions to enable the party to make an application (it says, "any party"), nor does it impose upon the bishop, at the instance of the party accused, the duty of entering into a preliminary inquiry of any sort or kind in which that party shall be heard against the issuing of a commission. I have always understood that as things are, it is, under the *Church Discipline Act*, sufficiently onerous both to the party accused and to those who promote proceedings against him,

(1) Law Rep. 2 P. C. 365. (2) 1 Hagg. Cons. 205.

to be obliged to incur the expense of a double inquiry, first before the commissioners, and afterwards in Court. But this is a proposal to compel a treble inquiry, and at the instance of the party accused, to enable him to turn the tables upon the accuser, and to require the bishop to hear the objections, and if to hear the objections, I should think to receive evidence upon any possible imputation which may be made against the character of the promoter.

As I said at first, I look upon this application as not only groundless but frivolous, and of course it must be refused.

SIR G. MELLISH, L.J.:—

I am entirely of the same opinion.

The question turns entirely upon the construction of the statute. There is nothing extraordinary in a provision that the first proceeding in a suit may be *ex parte*. Almost all proceedings are in the first instance *ex parte*. Take an application for a warrant, or the issuing of a writ, or the preliminary process before the grand jury. These proceedings are *ex parte*, and it is quite in accordance with our law that the first commencement of a suit should be *ex parte*.

I will then assume, what is not quite certain on the construction of the section, that the bishop has a discretion, on account of the character of the promoter, to refuse to issue a commission. I say it is not quite certain, because the words are, "It shall be lawful for the bishop;" and those words are very often considered to be compulsory. But for this purpose I will assume that he had a discretion; yet when we see that he may do it either on the application of any person or on his own mere motion, what is there in those words that can for a moment suggest that the party accused is to be entitled to be heard as to whether the promoter is a fit and proper person upon whose motion to issue the commission or not? It is to be observed that the statute does not in the least degree shew what are the objections (if any objections are to be made) which may be made.

What was principally relied upon by the applicant was the proviso that fourteen days' notice of the intention to issue a commission should be given to the party accused, together with the name and description of the party who has made the application.

L. C. and L. J. M. 1873 *Ex parte* EDWARDS.

It appears to me quite clear that that notice is to be given simply that the party accused may be able, when he comes before the commissioners, properly to make his defence. Of course he ought to have that sufficient notice before the commissioners meet, and it is quite right that he should have notice of who the person is who brings the accusation against him. That knowledge may be very material matter for him in framing his defence. I entirely agree with the Lord Chancellor, that there really is not the least ground for this application.

Solicitors: Messrs. *Brooks, Tanner, & Jenkins.*

RIDGWAY *v.* EDWARDS.

L. JJ.
1874
Jan. 20.

[1873 R. 121.]

Practice—Formâ Pauperis—Property—Injunction.

A farming tenant who has valuable crops on his farm, but no other property, will not be admitted to defend *in formâ pauperis*, although he has in the suit been restrained from selling or removing the crops.

Order of *Jessel*, M.R., affirmed.

THE Defendant in this case was tenant of a farm belonging to the Plaintiff, to whom rent was due, and who had obtained an injunction to restrain the Defendant from selling or removing the crops on the farm—the crops being of considerable value. The Defendant committed a breach of the injunction, and was for so doing committed to prison, but obtained an order for his discharge on payment of the costs of his contempt. He then, on the usual affidavit, obtained an order to be admitted to defend *in formâ pauperis*. He then moved before the Master of the Rolls to be discharged from prison as being unable to pay the costs; and the Plaintiff moved at the same time to discharge the order admitting the Defendant to sue *in formâ pauperis*.

The Master of the Rolls discharged the order upon the ground that the Defendant had property. Both motions were now brought before the Lords Justices by way of appeal.

Mr. *Roberts*, for the Defendant:—

The only property which the Defendant has is that upon the farm, and that he cannot touch. He is, therefore, unable to procure means to defend himself with. Moreover, these crops are the subject-matter of the suit, and he has nothing else. *Spencer* v. *Bryant* (1) was not at all similar.

Mr. *F. A. Lewin*, for the Plaintiff, was not called upon.

THEIR LORDSHIPS thought that the crops were not the subject-matter of the suit. The Defendant had the crops, and the

(1) 11 Ves. 49.

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injunction was not a sufficient reason for holding him a pauper, and he must be dispaupered.

Solicitors for the Plaintiff: Messrs. *Lewin & Co.*
Solicitor for the Defendant: Mr. *H. N. Capel.*

L. JJ. 1874 Jan. 21.

In re HAWES. *Ex parte* JEFFERY.

Costs of Liquidation—Subsequent Bankruptcy—Bankruptcy Rules, 1870, *r.* 292.

A liquidation by arrangement was rejected by the creditors, but a receiver appointed under the liquidation remained in office when the debtor was adjudged a bankrupt:—

Held, that the proceedings in liquidation were pending so as to enable the Court, under rule 292 of the *Bankruptcy Rules*, 1870, to direct the trustee of the bankruptcy to pay the costs of the liquidation.

Order of *Bacon*, C.J., affirmed.

H. M. HAWES, the debtor in this case, had presented a petition for liquidation by arrangement, under which petition a receiver had been appointed, and the receiver had taken possession of part of the debtor's estate. The first meeting of creditors was held, at which the creditors refused to pass any resolution for liquidation. The debtor was on the following day adjudged a bankrupt.

The Chief Judge ordered the costs of the petition for liquidation to be paid by the trustee under the bankruptcy, as reported (1). The trustee appealed. It was stated that the costs of the petition were £97, and would absorb nearly all the assets available for dividend.

Mr. *De Gex*, Q.C., and Mr. *Winslow*, for the Appellant:—

The question depends upon rule 292 of the *Bankruptcy Rules*, 1870, which directs the costs of a previous petition by liquidation to be paid by the trustee in bankruptcy, where the bankruptcy occurs pending liquidation. We say that the liquidation was at an end when the resolution was rejected, and that it could not be revived: *Ex parte Cobb* (2). The case does not come within

(1) Law Rep. 17 Eq. 61. (2) Law Rep. 8 Ch. 727.

the words, and as to the objects of the rule, why should not the solicitor obtain payment in advance or get security for his costs?

Mr. *Little*, Q.C., and Mr. *Finlay Knight*, for the Respondent.

Mr. *De Gex*, in reply.

SIR G. MELLISH, L.J.:—

The sole question in this case is, whether the solicitor who presented the petition for liquidation is, under rule 292 of the *Bankruptcy Rules*, 1870, entitled to the costs of that petition.

A meeting was held on the 28th of February, 1872, at which a majority of the creditors refused to pass any resolution in favour of liquidation. On the following day the debtor signed a declaration of insolvency, and on the same day he was adjudged a bankrupt. A receiver had been appointed under the liquidation, who took actual possession of the property of the debtor which at the time of the bankruptcy remained in his possession.

What the Court has now to decide is, whether in the present case proceedings for or towards liquidation were pending on the 1st of March, when the adjudication was made. I am of opinion that they were. The object of the rule is plain enough. If there was no such provision, the consequence would be that no solicitor would ever act on behalf of a debtor who desired to present a liquidation petition, or would ever recommend him to adopt such a proceeding, unless the solicitor received beforehand payment for the costs he was likely to incur. This would be very inconvenient and might prevent the petition from being presented.

The object of the rule was, that solicitors might know that if they acted properly they would get their costs of a liquidation petition, notwithstanding bankruptcy might ensue, and as far as the words will allow us we must fairly carry into effect the object of the rule.

Now, in my opinion, it is not necessary to put such a strict construction on the words as to hold that, whenever anything has taken place which renders it impossible to carry on the liquidation, the proceedings under the petition are no longer pending. So long as the liquidation is carried on by the existence of a

L. JJ. 1874 *In re* HAWES. *Ex parte* JEFFERY.

receiver, and so long as the Court could make an order in the matter, as, for instance, for the discharge of the receiver, or the passing of his accounts, and the creditors under the subsequent bankruptcy could derive a benefit from the liquidation proceedings, they might be said to be still pending. The receiver is an officer of the Court, and until he is discharged he holds possession of the property for the benefit of the creditors generally; and the person who was entitled to the property, on the assumption that the proceedings were put an end to, must come to the Court and ask for the discharge of the receiver. This has not yet been done, and the creditors have had the benefit of the appointment of the receiver as much as if he had been appointed under the bankruptcy.

In this particular case there may be another ground for our decision, on which it is not necessary to express any opinion. The resolution of the meeting could not be said to be finally passed until after the expiration of the three days allowed by the rules for registration, since if a sufficient number of creditors signed within that time a resolution in favour of liquidation, the liquidation by arrangement might go on.

I wish, however, to rest my decision upon the larger ground, that as a receiver had, under the liquidation, been appointed and had not been discharged, the proceedings in liquidation were still pending.

SIR W. M. JAMES, L.J.:—

I am of the same opinion. The appeal must be dismissed with costs.

Solicitors: Messrs. *Phelps & Sidgwick*, agents for Mr. *Jeffery, Oxford;* Mr. *C. Mallam*, agent for Messrs. *Mallam, Oxford.*

OCCLESTON *v.* FULLALOVE.

[1872 O. 9.]

L. C. and L. JJ.
1873
Dec. 4, 8.
1874
Jan. 26.

Will—After-born Illegitimate Children—Child en ventre sa mère at Date of Will, but born before Death of Testator—Reputation—Gift conducive to Immorality.

A testator, who had gone through the ceremony of marriage with *M. L.*, his deceased wife's sister, who had two daughters, *C.* and *E.*, by him, and who was *enceinte* with a third at the date of the will, gave a moiety of his property to trustees in trust for *M. L.* for life, and after her death for his reputed children *C.* and *E.*, and all other children which he might have or be reputed to have by *M. L.*, then born or thereafter to be born. The third child was born before the testator's death, and was acknowledged by him as his child:—

Held (*dissentiente* Lord *Selborne*, L.C.), that the after-born child was entitled to share with her sisters under the will.

Decision of *Wickens*, V.C., reversed.

Hill v. *Crook* (1), *Pratt* v. *Mathew* (2), *Blodwell* v. *Edwards* (3), *Metham* v. *Duke of Devon* (4), *Howarth* v. *Mills* (5), and *Holt* v. *Sindrey* (6), discussed.

THIS was an appeal from a decision of Vice-Chancellor *Wickens*.

On the 13th of August, 1862, *James Occleston* went through the ceremony of marriage, according to the rites of the Church of *England*, at *Neufchatel*, in *Switzerland*, with *Margaret Lewis*, his deceased wife's sister. By his will, dated the 9th of July, 1868, after directing that his debts and funeral and testamentary expenses should be paid and satisfied, and making certain specific and pecuniary bequests, he gave all his real estate, and the residue of his personal estate, to two trustees, their heirs, executors, &c., upon trust as to one half part or share of the annual income of his real and personal estates, to pay the same into the proper hands of his sister-in-law, *Margaret Lewis*, for life, for her sole and separate use, and after her decease upon trust to stand possessed of and interested in one half part or share of his real and personal estates, and any yearly income thereof which might be then due or accruing due, for his reputed children *Catherine Occleston* and *Edith*

(1) Law Rep. 6 H. L. 265.
(2) 22 Beav. 328.
(3) Cro. Eliz. 509.
(4) 1 P. Wms. 529.
(5) Law Rep. 2 Eq. 389.
(6) Ibid. 7 Eq. 170.

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Occleston, and all other the children which he might have or be reputed to have by the said *Margaret Lewis* then born or thereafter to be born, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, to be equally divided between and amongst them, share and share alike, as tenants in common, their heirs, executors, administrators, and assigns; and if but one such child, then the whole for such one child, his or her heirs, executors, administrators, and assigns. The testator gave one-fourth part of the income of his real and personal estates upon trust for his son, *T. B. Occleston*, for life, and the remaining one-fourth of such income upon trust for his son *S. Occleston* for life, with gifts over respectively.

By his first wife the testator had two sons, the said *T. B. Occleston* and *S. Occleston*, and by *Margaret Lewis* he had the said *Catherine Occleston*, who was born on the 6th of October, 1863, *Edith Occleston*, who was born on the 28th of January, 1866, and *Margaret Occleston*, with whom she was *enceinte* at the date of the will, and who was born on the 6th of January, 1869. The testator acknowledged her as his child, and registered her as such.

Margaret Lewis died on the 17th of January, 1869. The testator died on the 25th of December, 1870.

The suit was instituted in February, 1872, by *T. B.* and *S. Occleston*, for the administration of the estate by the Court, and for other purposes not material to be mentioned.

On the cause coming on for further consideration, the question arose whether *Margaret Occleston* was entitled to share with her sisters *Catherine* and *Edith* under the will. The Vice-Chancellor held that she was not entitled, and she appealed from his decision (1).

(1) 1873. June 10. WN(1873)137 SIR JOHN WICKENS, V.C.:—

I consider that this case is governed by the decision in *Pratt* v. *Mathew* (22 Beav. 328), which, in my opinion, is exactly in point. The gift here is to existing and future illegitimate children, and to a class of future illegitimate children. Under the gift to the future class this child, though at the date of the will *in esse* for certain purposes, cannot be permitted to take. I feel very great doubt whether the theory of the civil law which has been imported into our own with respect to children *en ventre sa mère* applies at all to a child born *e prohibito coitu*. But be that as it may, this is a gift to two children

Mr. *Karslake*, Q.C., and Mr. *W. W. Karslake*, for the Appellant:—

The form of the gift is equivalent to an express provision for a child *en ventre sa mère*, which is good. Then, independently of the construction point, the question is one of reputation. This child was *en ventre sa mère* at the date of the will, and there is neither principle nor authority against such a child having a reputation of paternity. On the contrary, the authorities are in favour of the possibility of such a reputation being acquired: *Pratt* v. *Mathew* (1); *In re Connor* (2). In the eye of the law the child is supposed to be *in esse*: *Doe* v. *Clarke* (3); *Trower* v. *Butts* (4). No objection on the ground of morality can apply to such a gift, because the child being already begotten, there is in the gift no inducement to future concubinage. On the contrary, it would be a violation of duty in a parent if he did not provide for his illegitimate offspring: *Gordon* v. *Gordon* (5). In most of the cases the validity of gifts to illegitimate children is rested on the sufficiency of their designation, not on grounds of morality; and in this case there is no possible uncertainty as to the child's paternity: *Hill* v. *Crook* (6); *Holt* v. *Sindrey* (7); *Barnett* v. *Tugwell* (8); *Chapman* v. *Bradley* (9); *Pearse* v. *Carrington* (10); *Earle* v. *Wilson* (11); *Evans* v. *Massey* (12); *Dawson* v. *Dawson* (13); *Wilkinson* v. *Adam* (14); *Jarman* on Wills (15); *Medworth* v. *Pope* (16); *Mortimer* v. *West* (17); *Co. Litt.* 3 (b), Mr. *Hargreave's* note.

Mr. *Dickinson*, Q.C., and Mr. *Dixon*, for the Plaintiffs.

Mr. *Morgan*, Q.C., and Mr. *Macnaghten*, for the trustees.

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named and to a class of future illegitimate children; and according to the decision in the case of *Pratt* v. *Mathew* not one of that class can take. I hold, therefore, that *Margaret Occleston* is not entitled to a share of this property.

(1) 22 Beav. 328. 2 Jur NS 365
(2) 2 J. & Lat. 456.
(3) 2 H. Bl. 399.
(4) 1 S. & S. 181.
(5) 1 Mer. 141.
(6) Law Rep. 6 H. L. 265.
(7) Ibid. 7 Eq. 170.
(8) 31 Beav. 232. 8 Jur NS 787
(9) 33 Ibid. 61. 9 Jur NS 1047
(10) Law Rep. 8 Ch. 969.
(11) 17 Ves. 528.
(12) 8 Price, 22.
(13) 6 Madd. 292.
(14) 1 V. & B. 422.
(15) 3rd Ed. 223.
(16) 27 Beav. 71. 5 Jur NS 996
(17) 3 Russ. 370.

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Mr. *Hemming*, for the two sisters of *Margaret Occleston*:—

There is nothing to indicate any intention of the testator to provide expressly for the child *en ventre sa mère*. If he had such intention he would have expressed it; nor is there any evidence that he knew that her mother was *enceinte*. But if he had specially referred to the child, the gift would have failed; for a gift to a man's reputed child *en ventre sa mère* is not good, because such a child cannot have obtained a reputation of paternity. This is distinctly laid down in *Blodwell* v. *Edwards* (1).

Neither can the child take as answering the description of a reputed child, because the words "reputed child" in the will of the reputed father mean simply "a child whom I may hereafter acknowledge;" and a gift to a person who may hereafter be acknowledged by the testator as a child is as bad as a gift to a person who may hereafter be acknowledged as a legatee. In both cases it would be a parol will by subsequent acknowledgment or designation.

If, therefore, *Margaret Lewis* takes, she must take as one of a class under the gift to the after-born reputed children of the testator. That is a void gift as to the class, and therefore as to every member of it: *Pratt* v. *Mathew* (2). It is void both because it is uncertain and because it is against morality, as tending to the continuance of the concubinage: *Metham* v. *Duke of Devon* (3); *Mortimer* v. *West* (4); *Wilkinson* v. *Adam* (5); *Pratt* v. *Mathew*; *Cartwright* v. *Vawdry* (6); *Arnold* v. *Preston* (7); *Howarth* v. *Mills* (8); *Hill* v. *Crook* (9); *Co. Litt.* (10). Nor can gifts by will be distinguished unless *Coke's* doctrine is limited to irrevocable deeds communicated to the concubine. A revocable deed—and *à fortiori* if uncommunicated—is as little an inducement to future immorality as a will, and yet the broad doctrine of *Coke* is admitted to apply to all deeds. Why not, therefore, to wills equally, seeing that the doctrine is always laid down as a broad general rule?

Mr. *Karslake*, Q.C., in reply, referred to *Clifton* v. *Goodbun* (11).

(1) Cro. Eliz. 509.
(2) 22 Beav. 328.
(3) 1 P. Wms. 529.
(4) 3 Russ. 370.
(5) 1 V. & B. 422.
(6) 5 Ves. 530.
(7) 18 Ves. 288.
(8) Law Rep. 2 Eq. 389.
(9) Ibid. 6 H. L. 265.
(10) 3 b. Ed. 19.
(11) Law Rep. 6 Eq. 278.

1874. Jan. 26. LORD SELBORNE, L.C.:—

In this case, in which I have the misfortune to differ from my learned Brothers, I should have been glad, so far as the particular interest of the Appellant is concerned, if I could have given my voice for altering the Vice-Chancellor's decree. It is certain that a gift to a child of which an unmarried woman is at the time pregnant is not against the policy of the law; on the contrary, such a gift, by a person who acknowledges himself to be the father of that child, is as much within the moral obligation referred to by Lord *Eldon* in *Gordon* v. *Gordon* (1) as if the child had been already born. Nothing was necessary for this purpose but that the testator should have sufficiently described as the object of his bounty the particular child, of which *Margaret Lewis* was at the date of his will *enceinte*. But it does not appear that he then knew (if necessary, I should myself infer from the will and the evidence that he did not know) that she was in that condition, and there is clearly no reference to that particular child in the terms of the bequest. If the Appellant takes at all, it is by force of the general words, descriptive of "all the other children" (besides the two expressly named) "which he, the testator, might have, or be reputed to have, by the said *Margaret Lewis*, then born, or thereafter to be born;" *Margaret Lewis* being, and appearing on the face of the will to be, a person with whom he could not lawfully intermarry.

It is clear from all the authorities that, if the Appellant takes under this description, it can only be as a "reputed" child of the testator by *Margaret Lewis*. That reputation cannot, in my opinion, have been acquired when this will was made; it was, however, acquired after the birth of the Appellant, which took place about six months later than the date of the will. Two questions thus arise for decision—the one, whether, under a gift by will to future reputed children of the testator by a woman whom he could not marry, all children born of that woman between the date of the will and the testator's death, who may before his death have acquired the reputation of being his children, can take? The other, whether (if this be not so) a child of the woman who was *en ventre sa mère* at the date of the will, and who

(1) 1 Mer. 141.

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afterwards in the testator's lifetime acquired that reputation, takes? I do not think that the latter question is, in the present case, materially affected by the use of the words "now born," as well as "hereafter to be born," although the use of that form of words by a testator who had just named his only two then existing reputed children is remarkable. It was argued that "now born" must, under the circumstances (or at all events may), mean now *in esse* in a sense applicable to a child *en ventre sa mère*. But in a case of illegitimacy, where the fact of paternity is incapable of being inquired into, and the fact of reputation did not then exist, I cannot adopt that argument.

Of the two questions which I have stated to arise in this case, the first and more general may involve considerations of public policy of a larger kind than any which can affect the second. The rule, however, against the reception of direct evidence of paternity, which in several of the cases is described as a rule of public policy, applies equally to both; and, as it seems to me, the difficulty of identifying the persons intended to be benefited by means of a reputation of this kind acquired after the date of the will, also affects both questions alike. Nothing is given to the Appellant individually, which (so far as the construction of the will is concerned) is not equally given to any other after-born child of *Margaret Lewis* who might acquire the necessary reputation. She takes, as has already been said, if she takes at all, only as a member of the class of future reputed children.

When a testator makes a gift to children already born, and reputed to be his own at the date of the will, he sets the seal of his adoption and acknowledgment upon that existing reputation, and makes that extrinsic fact, known to and recognised by himself, the test of the identity of the persons intended. Whatever may be the origin or character of the reputation, the gift, in every such case, is to a particular living person, known to the testator as possessing it, and for that reason discoverable without difficulty by admissible extrinsic evidence. But these considerations are wanting when the person is not in existence and when the reputation is afterwards to be acquired. What is to constitute in that case the necessary reputation? On whose opinion is it to depend? When must it be gained? Must it be consistent and

unambiguous? Must it be continuing till the testator's death? Must it be supported by the acts or acknowledgments of the testator himself? Would his rejection or repudiation be enough to invalidate and destroy it? These and other similar questions cannot, as I conceive, be satisfactorily answered unless an answer to them can be extracted from the proper grammatical sense of the mere word "reputed," and I do not think that it can. I am disposed, therefore, to think, that such a description of non-existing children, with reference to a reputation to be afterwards acquired, supplies no sufficiently certain means of identifying the objects of the gift.

With respect to the first and larger question, the present state of authority appears to me to be decidedly adverse to the Appellant, although Lord *Eldon*, in *Wilkinson* v. *Adam* (1), declined to determine that question, and although it may be admitted that no case has yet been determined upon words exactly like these, or so expressly providing for future "reputed" children.

In *Pratt* v. *Mathew* (2) the Master of the Rolls said: "It is quite settled that a bequest cannot be made by a man to his future illegitimate children, for they can have acquired no title by repute. It is not necessary to consider whether a gift to the illegitimate children of a woman is valid:—that has never been determined." In *Medworth* v. *Pope* (3), however, Lord *Romilly* thought it necessary to decide the question which he had reserved in *Pratt* v. *Mathew*, saying, "An illegitimate child *in esse* or *en ventre sa mère* may, if properly described, take the benefit of a devise or bequest, and the Court will not inquire as to his parentage or origin; but in respect of future illegitimate children the law will not allow them to take under any description whatever." In *Barnett* v. *Tugwell* (4) the same Judge also said, "It is admitted that no bequest in favour of after-born illegitimate children can be supported." In *Howarth* v. *Mills* (5) Vice-Chancellor *Wood* held a gift by a woman who had gone through the ceremony of marriage with her deceased sister's husband to be void as to her after-born children, the words of gift being, "to each and every of my

(1) 1 V. & B. 468.
(2) 22 Beav. 339.
(3) 27 Beav. 71, 73.
(4) 31 Ibid. 236.
(5) Law Rep. 2 Eq. 389.

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children, legitimate or otherwise, which shall be living at the time of my decease." In *Holt* v. *Sindrey* (1) Vice-Chancellor *Stuart* said, "As to the rest of the gift to the children 'to be begotten' it must fail, because every gift to an illegitimate child the begetting of which is contemplated is against the policy of the law." The rubric at the head of the report of this case which substitutes the words "illegitimate children unbegotten at the time of the testator's death," is erroneous. The Vice-Chancellor refers throughout his judgment, not to the time of the testator's death, but to the date of the will. In *Hill* v. *Crook* (2) Lord *Chelmsford*, when moving the judgment of the House of Lords, said: "No gift, however express, to unborn illegitimate children is allowed by law, nor under a gift good as to illegitimate children, as a class, will after-born illegitimate children be permitted to take." Lord *Colonsay* (3) said: "Two things are clear, and do not depend in any degree on the intentions of the testator or the terms of his will, viz., first, that the union of *Mary Hill* and *John Crook*, though in form a marriage, was, by law, not a valid marriage, and that the children born of that union were not legitimate children; secondly, that the testator could not by any form of words make an effectual bequest in favour of after-born children of that union, or create a trust for the benefit of such after-born children, and, consequently, that no such children can take under the will in question." Lord *Cairns* did not dissent from Lord *Chelmsford's* statement of the law. His words (4) are: "I do not go over what has been said by my noble and learned friend now sitting upon the woolsack as to the impossibility of providing for future illegitimate children; that is out of the question here." I am not aware that in any case before the present any Judge has ever laid down a doctrine at variance with the language of these authorities. With respect to the principle of this doctrine, I do not understand it to be disputed that the policy of the law, which opposes itself to everything *contra bonos mores*, is against prospective gifts by deed, or even by will, to illegitimate children, where any such children begotten after the deed or will comes into operation would be capable of taking under them. But the

(1) Law Rep. 7 Eq. 176.
(2) Ibid. 6 H. L. 278.
(3) Law Rep. 6 H. L. 280.
(4) Ibid. 285.

authorities are not expressed in any such qualified terms. The opinion stated, without qualification, by Vice-Chancellor *Stuart* in one of the cases cited, that "every gift to an illegitimate child the begetting of which is contemplated" (a definition not extending, as His Honour proceeded to observe, to a child *en ventre sa mère* at the time of the gift) "is against the policy of the law," is the same which had been some years before expressed by Lord *St. Leonards* in *In re Connor* (1), who regarded this as the true reason why, in order to provide for children of that class, they must first acquire a name by reputation. Lord *Romilly* also, in *Medworth* v. *Pope* (2), had said: "The reason why the English law so holds is, that it considers such a provision for future illegitimate children as *contra bonos mores*." And Vice-Chancellor *Wood*, when deciding *Howarth* v. *Mills* (3), said: "The point was mooted in the case of *Wilkinson* v. *Adam* (4), in which Lord *Eldon* threw out some suggestions, but said he would leave the point where he found it, without any determination. Since then the question has been decided by the present Master of the Rolls, the only difference being that in that case the provision was made by the reputed father, whereas here it has been made by the mother; and if it be *contra bonos mores* in a reputed father to provide for after-born illegitimate children, it cannot be less so in the case of a mother. I apprehend that, after the well-known case of *Pratt* v. *Mathew* (5), the policy of the law, that a man cannot make a legal bequest to the future children of his marriage with his deceased wife's sister, is clearly established."

Whether in this last passage too much weight may not have been ascribed to the single authority of *Pratt* v. *Mathew*, I do not inquire. It may be admitted that, as to this point, what was said in *Pratt* v. *Mathew* was not necessary for the decision, and the same is true of most of the other authorities to which I have referred. But *Howarth* v. *Mills* is itself a decision expressly to the purpose, not indeed of any Court of Appeal, but of a most eminent Judge; and I think it is difficult to take any other view of the earlier case of *Medworth* v. *Pope*, before Lord *Romilly* (which

(1) 2 J. & Lat. 460.
(2) 27 Beav. 73. 5 Jur N S 996
(3) Law Rep. 2 Eq. 391. 12 Jur NS 794
(4) 1 V. & B. 422, 468.
(5) 22 Beav. 328. 2 Jur NS 365.

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was cited in *Howarth* v. *Mills* (1), in which Lord *Romilly* clearly construed the will as descriptive of illegitimate and not of legitimate children. In both those cases the gifts were to the illegitimate children of a woman, and therefore were free from the difficulty attaching to the proof of paternity. In *Howarth* v. *Mills* the objects of the gift were the children of the testatrix herself, "legitimate or otherwise, which should be living at the time of her death." In *Medworth* v. *Pope* (2) they were the six natural children already born of the testator by his housekeeper, *Sarah Gibson*, and "such other child, if any, that might be born of his housekeeper, *Sarah Gibson*, in his lifetime, or in due time after his death." In both, the gifts to the after-born children were held void. These are decisions directly opposed, as it seems to me, to the suggested distinction between a gift by deed or will to illegitimate children who may be begotten after the deed or will takes effect, (which is admitted to be void, as offering an incentive to immorality), and a gift by will to such illegitimate children only as may be born, or *in esse*, at the death of the testator, which is said to offer no such incentive. In however forcible a light the difference, for this purpose, between a gift by deed and such a gift by will may be presented, I am not myself satisfied that the distinction can be practically established without a material encroachment upon the principle which is admitted to stand in the way of a prospective provision by deed for future illegitimate children. If the present testator had settled property, by deed, upon himself for life, with remainder to such of the children whom he might at the time of his death be reputed to have by *Margaret Lewis*, as he should by will appoint, and in default of any valid appointment to *A. B.*, I suppose it would not be contended that the power of appointment, as to the after-born children, would have been good, even though the deed might have contained a general power of revocation, and might have remained in the testator's custody without communication to any one till the time of his death. So far as public policy is concerned, I do not see what material difference there is between that and the present case. A law which does not enable a man to fortify himself, or to encourage another, in entering upon or in continuing an immoral course of life, by

(1) Law Rep. 2 Eq. 389. (2) 27 Beav. 71.

anticipating and providing for its future consequences, even by a testamentary instrument not operative (though not necessarily kept secret) till his death, may, as it appears to me, reasonably be regarded as more in the interest of public morality than one which recognises and enforces such provisions.

The language used by so many learned Judges in the cases to which I have referred precludes the possibility of its being supposed that provision could, in their opinion, be made for future illegitimate children, by so simple a process as the mere employment of a form of words descriptive of the reputation and not the fact of paternity. If a gift may be made to future reputed children, I am unable to understand why, on any sound principle of construction, the reputation, which is the necessary medium of proof that an illegitimate child stands in that relation to its supposed father, must be expressly referred to in a gift to after-born more than in one to existing children. When a gift is made to the existing "natural" or "illegitimate" children of a testator, proof of the reputation, known to and recognised by the testator, is always enough to shew who are meant; and if a gift can be effectually made to future "reputed" children, it is not easy to find a good reason why the same evidence of reputation, which on that hypothesis would be admissible and sufficient to identify the objects of such a gift, should not be permitted to have equal effect if the gift were in form to the testator's future "natural" or "illegitimate" children. In law those words mean, and can only mean, reputed children.

I feel obliged, therefore, to answer in the negative the first of the two questions which I have stated as arising in this case. And if that first question is properly answered in the negative, I think it is impossible to give an affirmative answer to the second; for the reasons which were well stated by Lord *Romilly* in *Pratt* v. *Mathew* (1) against separating from the general class of after-born children a child who was *en ventre sa mère* when the will was made, but to whom there is no gift otherwise than as a member of that general class. It is true, as I have already said, that there would have been no objection on the ground either of uncertainty or of public policy if the Appellant had been

(1) 22 Beav. 328. 2 Jur N S 364

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personally designated by the will; but, unfortunately, she is not so designated.

Lord *Romilly's* remarks, though not necessary for the decision of *Pratt* v. *Mathew* (1), are in accordance with Lord *Macclesfield's* decision in *Metham* v. *Duke of Devon* (2), in which it was determined that under a gift by will to the natural children of a particular man by a particular woman, (under which after-begotten children did not take), no one was entitled to participate who had not already obtained the reputation of being such a natural child when the will was made. The gift in that case was "to all the natural children of the testator's son by Mrs. *Heneage*," a married woman. There were children at the date of the will who had already acquired the reputation, and who took. There was another child *en ventre sa mère*, who, after his birth and during the lifetime of the testator, acquired the same reputation; but this child, as well as all others who were born still later, was excluded. Holding as I do that in the present case the general class of after-born reputed children of the testator could not have taken, and that the Appellant had not at the date of this will acquired the necessary reputation, I am unable to concur in a reversal of the Vice-Chancellor's decision. But as both the Lords Justices are, for the reasons which they will give, of a contrary opinion, the judgment of the Court will be in accordance with their view.

SIR W. M. JAMES, L.J.:—

If the will in this case were read and considered merely for the purpose of ascertaining the testator's intention, the language being construed however strictly according to the ordinary grammatical meaning of the words used by him, it seems to me beyond all doubt that the testator intended the Appellant as one of the objects of his bounty. He meant the children born of the body of the particular woman to take, with this qualification, that they should be children of whom he should have acquired the reputation of being the father. If the case had been the case of a child *en ventre sa mère* at his death, there might have been a great, perhaps an insuperable, difficulty in attributing reputation of paternity in the male, while there was nothing but signs more or less visible of a possible

(1) 22 Beav. 328. (2) 1 P. Wms. 529.

365.

or probable parturition expected of and by the female. But in this case it appears to me the very case contemplated and provided for by the testator so far as he could by law provide for it. Between the date of his will and the time of his death a child was, with his knowledge, born of the body of the woman while she was living with him as his wife. After the birth the cohabitation continued, and the child was in the most formal manner recognised by him by his registering the birth as the birth of the child of himself and his concubine, described by him in the register as his wife, and therefore, so far as he could, treating the child as legitimate. This evidence is to my mind absolutely conclusive that at the time when the will came into operation, when on his death it was opened and read, the Appellant did strictly and completely fulfil the description of a "child which he was reputed to have by the said *Margaret Lewis*." If so, why should she not take? It is said that there is some rule of law, based upon some rule of morality or on some rule of construction, which absolutely prevents me from giving effect to what I have judicially ascertained to be beyond all question the meaning of the plain and clear words of the testator.

In the case of *Crook* v. *Hill*, Lord *Chelmsford* is reported to have said (1): "No gift, however express, to unborn illegitimate children is allowed by law; nor under a gift good as to illegitimate children, as a class, will after-born illegitimate children be permitted to take." Lord *Colonsay* is reported to have said (2): "Two things are clear, and do not depend in any degree on the intention of the testator or the terms of his will, viz., first, that the union of *Mary Hill* and *John Crook*, though in form a marriage, was, by law, not a valid marriage, and that the children born of that union were not legitimate children; secondly, that the testator could not by any form of words make an effectual bequest in favour of after-born children of that union, or create a trust for the benefit of such after-born children, and, consequently, that no such children can take under the will in question." And Lord *Cairns* is reported to have said (3): "I do not go over what has been said by my noble and learned friend now sitting upon the

(1) Law Rep. 6 H. L. 278. (2) Law Rep. 6 H. L. 280.
(3) Law Rep. 6 H. L. 285.

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woolsack as to the impossibility of providing for future illegitimate children; that is out of the question here."

Lord *Cairns*, in the latter clause of the sentence points out, with his usual accuracy, that the expressions of his noble and learned compeers were *obiter dicta*, not at all necessary to the decision of the case before them; and they are open to this further observation, which always weakens the force of any judicial *dicta*, that they were made in the way of concession to the party against whom they were about to decide.

If the expression "future children" be limited to what I conceive to be its more accurate meaning—children to come into existence after the will itself has really come into existence as the last will of the testator, viz., after his death—then I would at once, for reasons subsequently given, concede that there is, or may be, such a rule of law as that referred to. But if it be extended to apply to children coming into existence between the date or execution of the will and the death of the testator, then, in my humble judgment, the proposition is not one to be assumed, as it appears to have been in those judgments or speeches.

I will follow the example of Lord *Cairns* in that case, and suppose a will to be written out at full length, expressing the testator's intention and meaning, and motives or grounds. Assume the will to be thus written: "Whereas I am living in a connection unhallowed and illicit with *A. B.*, and there have been, and in the course of nature it is probable there may be, offspring born of her body, the fruit of our intercourse, and I do not think it right such offspring should be a burden upon the community, and I desire that, notwithstanding the misfortune of their birth, they should not be left without sufficient means for their maintenance, education, and future welfare, Now therefore I do make the following provision for all children born of her body while she is cohabiting with me." Now what is there against morality, or religion, or public policy in such a provision?

Lord *Eldon*, in *Gordon* v. *Gordon* (1) uses the following language: "If the words in this case were these: 'Whereas *A.* is now pregnant by me,' this would imply a positive assertion of a fact the truth of which it cannot, on grounds of public policy, be suffered

(1) 1 Mer. 148, 149.

to sustain by evidence. But a man may most conscientiously make use of the terms adopted by this testator to denote his belief of a fact, and his intention to proceed, not upon the fact itself, but upon such his belief of it. No doubt where a man assigns certain positive reasons for giving a legacy, if those reasons fail, the legacy may be taken away. But here the testator has expressed the grounds upon which he acts to be these: 'I believe that I am the father of the child with which this woman is now *enceint*. I may be mistaken, but I had rather run the risk of providing for a child that is not my own, than of incurring the guilt of leaving a child of mine without a provision.'"

I cordially concur in every word here used by Lord *Eldon*, and I must say that to me it appears a shocking and a perverse thing to say that religion, morality, or public policy compels the law to throw difficulties in the way of a man who is desirous of not committing posthumously a great crime, and who is desirous of making for his misconduct the best reparation he can both to society and to the unfortunate beings of whose existence he is the author. What would be the natural—I would almost say the legitimate—feelings of a wretched being towards that law by which, and towards that religion and morality in the name of which, he finds himself deprived of the provision which his sire had carefully tried to make for him, and in consequence made, it may be, the inmate of a union workhouse, or a pariah outcast infesting the public streets?

In considering this question, it is necessary to have accurately in one's mind the distinction, in legal effect, between motive and consideration or inducement. The law does not pretend to deal with the motive to testamentary bounty, or any other bounty. A testator's bounty is absolute and without control as to motive. A man may leave his virtuous wife and deserving children penniless, and bestow the whole of his fortune upon the vilest companions of his profligacy, the most worthless partners of his vices, the most wicked accomplices of his crimes, and the law cannot gainsay him, even if he should openly flaunt his shocking disregard of all ties human and divine on the very face of his will. But if there be any inducement to do wrong, the law can and does deal with it. If there be any covenant for a *turpis causa*, the covenant is void. If there

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be an illicit condition precedent or subsequent to a gift, it either avoids the gift or becomes itself void. If the gift requires or implies the continuation of wrong-doing, that is in substance a condition of the gift, and falls within the rule as to conditions. But how can that apply to an instrument like a will, with reference to gifts taking effect at the death in favour of persons then in existence? The will takes effect because, whenever dated or executed, it is the expression of the testator's last will—of the intentions which he has at the last moment of his existence. His keeping and leaving it unrevoked is, in point of law, and generally in fact, a continued adhesion to it. And if a man could, by an attested signature, made the moment before his death, make validly such a disposition as that now in question before us (of which there can be no doubt), how does any question of public policy intervene to affect the disposition which he has made some days, or months, or years beforehand, to be produced and take effect as his last intention upon, and not until, the moment of his death? His own will can be no inducement to himself to continue a life of immorality; it can be no inducement to the partner of his sin. What would be an inducement may easily be conceived. A man might make, as here, a valid will in favour of his unlawful consort and their actual offspring, and hold, *in terrorem*, over her his power of revocation to coerce her into a continuance of her wrong-doing. She might have courage to break off the sinful connection, and he might ostentatiously add a codicil expressly revoking the will on that ground, and the law could not, I apprehend, interfere with that revocation.

I would add as an illustration, what appears to me a *reductio ad absurdum* of this supposed rule of public policy, this case: Take the case of a gift to a concubine of the man's property charged with the maintenance and education of her offspring, described as in this will; does morality require that this Court should give her the whole, leaving her, if she please, to throw the offspring on the streets?

Then, is there really any established rule of construction which makes it impossible for a man to make provision for the illegitimate offspring of an unmarried female born between the date of his will and the day of his death? He could, unquestionably, I apprehend,

make provision for any other persons if sufficiently described. He might leave his fortune to children in the union workhouses; he might leave it to all the persons who should be living in his house as part of his family circle at the time of his death; he might leave it to the children to whom he had stood or should stand sponsor; and I cannot conceive it possible that there could be any inquiry as to the legitimacy or illegitimacy of those who had come into existence since the date of his will, or any inquiry as to whether his motive for such a bequest was the belief that he might have been the cause of their coming into existence. There is, no doubt, a rule of construction that *primâ facie* the term "children" means lawful children, and there is a rule of law that an illegitimate child has no father: "*Pater est quem nuptiæ demonstrant.*" And it must be admitted that the law is in some respects the same as to maternity, although there is no such maxim as its foundation—*e.g.*, there can be no heirship or succession to personal property by kinship as between such a mother and such a child. The result is that the word "child," used in the sense of son or daughter, means a legitimate child. Indeed, accurately speaking, there can be no more an illegitimate child than there can be an illegitimate legitimate, no more than there can be an oblique angled square, or an elliptical circle. A man may, however, unmistakably shew on the face of his will that by the description of children he means persons, or means to include persons, of illegitimate birth, as he may shew that under the term square he means or includes a rhomboid, or under the term circle he means or includes an ellipse.

Another result is, that when a man is speaking of illegitimate children as his, there can be no doubt as to what he means as to existing children; but there may be an insoluble question, an uncertainty not capable of being made certain as to future children. A man makes a gift "to my future children by *A. B.*," there is a condition annexed to the gift that they shall be really his children, but that is a condition the existence or non-existence of which it is impossible to ascertain. His access or non-access, the access or non-access of any other person or persons, the more or less profligacy or immorality of the female, the signs of race or caste or blood, might have all to be inquired into and brought into public discussion before it could be acertained whether

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or not they were his children. The law forbids such inquiries, and, except in exoneration of parish rates, accepts no evidence of actual paternity but the marriage union. But with regard to the female there is no uncertainty. Whether a child is or is not born of her body is a fact perhaps of all others the most easily capable of conclusive proof, and, if there be an unqualified, unconditional gift by a testator "to the illegitimate children born and to be born of the body of *A. B.* before my death," there can be, at all events, no uncertainty in ascertaining at his death who are the persons answering the description. And if he superadds to that the words "of whom I shall be the reputed father," giving to those words the fair meaning, the *benigna constructio*, which all the words of an instrument ought to have, I find no element of uncertainty. It does not mean, I conceive, that of which the gossip of the neighbourhood may spread a rumour or fame, but that reputation which springs from acknowledgment, conduct, and life. The burden of proof no doubt lies in this, as in every other case, on the person who alleges that he answers the description, but I can conceive no difficulty in producing, in a proper case, sufficient evidence of that reputation. On such an issue I apprehend the admissible evidence would be what has been the continued cohabitation and acknowledgment, or acknowledgment merely, and against which there would not, I apprehend, be admissible evidence of any gossip, true or slanderous, of the neighbourhood, as, for instance, that the woman had deceived and hoodwinked the man, and that the real sire was one of the house or farm servants, who was her secret paramour.

Upon principle, therefore, I can see nothing which is to prevent my giving effect to the plainly-expressed intention of the testator in favour of the Appellant.

Is there then anything in the authorities which constrains me to disregard my own judicial conviction that the Appellant is justly and lawfully entitled to share in the bounty of the man who has called himself her father and put himself in the position of father to her?

The authorities, when reduced to their real proportions, come, in my judgment, to very little that is really relevant. Such a will as the present has never been before the Courts for judicial construction, except perhaps in one case before Vice-Chancellor *Wood*, which

is, of course, as much open to reconsideration here as the decision of Vice-Chancellor *Wickens*. The authorities establishing any general principle applicable to the case are really only two, viz., the case of *Blodwell* v. *Edwards* (1), and the case of *Metham* v. *Duke of Devon* (2). The former case was certainly, in more respects than one, a very singular case in which to raise the question, as the cohabitation, as it turned out, was a cohabitation in valid marriage, open to question apparently only in this way, that there had been a previous divorce *à vinculo*, and that the decree declaring such divorce might be reversed on appeal. Such appeal had by death, however, become impossible. The marriage, therefore, was indefeasible and valid, the issue were indefeasibly legitimate, and the point was never before the Court for actual adjudication. Even so far as any resolution was come to by the Judges on the hypothetical question, there was difference of opinion between them. The reports of the case are actually contradictory as to what the resolution was, and although the internal and other evidence is very strong in favour of the accuracy of *Croke's* report, yet the mere fact that there are such different reports shews that the dogma had not been accepted with universal acquiescence and recognition, without which the extra-judicial resolution or talk of a majority of the Judges could hardly have the force of law.

It is difficult, moreover, to conceive how any question of morality or public policy could have legitimately entered into the consideration of that particular case. There was an union which, if the decision of a competent Court had remained unreversed, was a lawful and valid union; there was a bare possibility of reversal, and the man was desirous of protecting the issue of the union from the consequences of such a reversal. To ordinary apprehension that would seem a very provident and very moral act.

The authority of that case must be really referred to the way in which the resolution of the Judges was adopted and incorporated by Lord *Coke* into his great exposition of the English law (3). Lord *Coke* states it thus: "A man makes a lease to *B.* for life, remainder to the eldest issue male of *B.* and the heirs males of his body. *B.* hath issue a bastard son, he shall not take the remainder, because

(1) Cro. Eliz. 509; Noy, 35. (2) 1 P. Wms. 529.
(3) 1 Co. Litt. 3 b. Ed. 19.

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in law he is not his issue, for *qui ex damnato coitu nascuntur inter liberos non computentur*. And, as *Littleton* saith, a bastard is *quasi nullius filius*, and can have no name of reputation as soon as he is born. So it is if a man make a lease for life to *B.*, the remainder to the eldest issue male of *B.* to be begotten of the body of *Jane S.*, whether the same issue be legitimate or illegitimate, *B.* hath issue a bastard on the body of *Jane S.*, this son or issue shall not take the remainder, for (as it hath been said) by the name of issue, if there had been no other words, he could not take, and (as it hath been also said) a bastard cannot take but after he hath gained a name by reputation that he is the son of *B.*, and therefore he can take no remainder limited before he is born, but after he be born, and that he hath gained by time a reputation to be known by the name of a son, then a remainder limited to him by the name of the son of his reputed father is good, but if he cannot take the remainder by the name of issue at the time when he is born, he shall never take it;" shewing that it was in his view a mere question of construction. It will be observed, moreover, that that was the case of a deed taking effect immediately, creating an actual remainder, and the substance of what he says is, that a person cannot take a remainder by the name of issue who is not issue, nor by any name or description of reputation, because he could not have such name or description at the moment of his birth, and if he could not take at the moment of his birth he could not take at all. How does that necessarily or at all apply to the case of a person who claims to take by a name or description actually predicable of him, not, it is true, at the time when he is born, but at the time when the gift itself first comes into existence?

And if the case be considered, not with reference to the very peculiar circumstances of *Blodwell* v. *Edwards* (1), but with reference to the abstract question of a provision by deed in favour of the future issue of an avowedly illicit intercourse, it is obnoxious to the plain rule that if the gift takes effect at all it takes effect as a gift on condition that there shall be unlawful intercourse resulting in the birth of offspring, and is therefore void. So I conceive that if a testator were to provide by will for the offspring of a really future *damnatus coitus* (future with respect to the will taking effect as a

(1) Cro. Eliz. 509.

will), it would be void as a gift, by reason of the illegal condition precedent, and as being a direct inducement to the man and woman to continue in a life of lawless immorality. But that, as I have said, cannot be predicated of an instrument revocable and secret until the moment of the testator's death, and a gift thereby made absolutely and without any condition in favour of a person then in existence, however that existence had been caused.

Then there is the case of *Metham* v. *Duke of Devon* (1). That, again, is in some respects a singular case, and very briefly reported. A will directed a certain sum to be raised and to be paid to such persons as the testator should by deed appoint. The testator, by deed, appointed the sum to all the natural children of his son by Mrs. *Heneage*.

The decision was that all the children took who were born at the date of the deed, but not such children as he afterwards had by her. The report has the following as to the question of a child *en ventre sa mère*: "Also, it being a question whether a natural child *en ventre sa mère* of the Duke of *Devonshire* by Mrs. *Heneage* should take, Lord *Parker* inclined that such child could not take, for the reason above mentioned, viz., for that a bastard could not take until he had got a reputation of being such a one's child, and that reputation could not be gained before the child was born."

That appears to me to have been dealt with as and to have been a plain case of construction of the words used. A gift to the children of *A.* by *B.*, when applied to illegitimate children, could only, at all events *primâ facie*, mean persons then reputed as children, persons of whom the Court could predicate that the donor meant them by that description, and there was nothing in the will to shew any intention to include any others. But suppose the will had contained the words, "including the child of which she is now *enceinte*," there could be no doubt that that child would have taken, however strong might be the evidence that the child was not really procreated by the paramour. And suppose the will had been "for all the children born of the body of Mrs. *Heneage* during my life and while she is living with my son," we have, I think, no clue to what would have been the decision of Lord *Macclesfield*. He puts the case entirely on intention. He says: "The Earl of

(1) 1 P. Wms. 529.

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Devonshire could never intend that his son should go on in this course; that would be to encourage it, whereas it was enough to pardon what was past." He further says, it is true, "Besides, bastards cannot take unless they have gained a name by reputation." That really means that bastards cannot take by the name of children or issue until they have gained the reputation of being children or issue. If it means more, it is directly overruled by the decision of Lord *Eldon*, with the concurrence of Sir *William Grant*, that a gift to a bastard child *en ventre sa mère* is clearly good.

I would add that that decision of Lord *Eldon's* seems to me to go a great way towards deciding the present question. He says, in effect, if you eliminate the question of actual paternity, which is incapable of proof, there is no reason why such a person should not take if sufficiently designated. If there is no legal uncertainty as to the fact that a particular person was a person *en ventre sa mère* at a particular date, there can be no legal uncertainty as to whether such person, or any other person, was actually born of the body of a particular woman.

Nor can there, as it appears to me, be any more uncertainty in ascertaining the reputation of paternity as to children born between the date of the will and the death, than there is in ascertaining the reputation of paternity as to children before the will. In each case it would have to be ascertained alike by the same evidence and the same means as in *Scotland* and almost every European country but *England;* the putative paternity is ascertained for the purposes of legitimation by subsequent marriage. Take the case of an unquestionable gift by a man to his natural children by *A. B.;* evidence would be admissible to exclude children of *A. B.* born during a previous concubinage with another man, and to ascertain which children really had obtained by reputation the character of being his. And I can see no difficulty in admitting and obtaining similar evidence as to the children born between the will and the death.

I am of opinion, on the whole case, that the testator's intention is clear, that there is no principle of public policy to prevent that intention being effected, and that there is no authority to prevent my giving a decision in accordance with what I feel to be the truth, the honesty, the morality, the justice of the case, in favour

of the Appellant's right to share with her sisters in the bequest in question contained in the testator's will.

SIR G. MELLISH, L.J., after shortly stating the facts of the case, continued:—

The question to be determined is whether *Margaret Occleston* is entitled to take with *Catherine Occleston* and *Edith Occleston*, the one half of the residue of the testator's real and personal estate. I think it is clear that she cannot take as an actual child of the testator by *Margaret Lewis*, because, although there is evidence from which any jury would find, if the question could be left to them, that the Appellant was a child of the testator by *Margaret Lewis*, yet it seems clear on the authorities that the law does not allow such evidence to be given, and this was not seriously disputed. I also think that she cannot take as a child of *Margaret Lewis*, who was reputed to be a child of the testator at the date of making the will, assuming that an illegitimate child can acquire the reputation of being the child of a particular man whilst in *ventre sa mère*. I think there is no sufficient evidence that the Appellant had at that time acquired the reputation of being the child of the testator. There is no evidence that the testator or any one else knew at that time that *Margaret Lewis* was with child, and it seems to me impossible to infer that a child whose existence was unknown was the reputed child of anybody. If, therefore, the Appellant takes at all, she must take as a child which the testator was, subsequent to the making of his will, reputed to have by *Margaret Lewis*. Now two objections are in substance taken to the right of the Appellant so to take:—First, that there is not, and indeed could not be, a sufficient legal description to enable a class of subsequent born illegitimate children to take; and secondly, that it is contrary to the policy of the law to allow such a class to take, even if they could be sufficiently described.

Now, with reference to the first question, it appears to me that every child of *Margaret Lewis* who was born during the testator's lifetime, and who at the time of his death was his reputed child, must be included in the class. Whether, if there had been a child in *ventre sa mère* at the time of the testator's death, who afterwards was born and acquired the reputation of being the

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testator's child, such a child would have been included, may be doubtful; but, giving the narrowest construction to the words of the will, every child born in the testator's lifetime, and who was his reputed child at the time of his death, must, I think, be included. Then is such a bequest void upon the ground of the insufficient description of the persons who are to take? I am of opinion that it is not. It is clear that a bastard may take as the reputed son of a particular person after he has acquired such reputation. Now, no one can take under a will until the testator is dead, and if at that time a child has acquired the reputation of being a child of the testator, why may he not take under the description of a reputed child of the testator? As a general rule, it is obviously wholly immaterial that a person who is to take a bequest under a will cannot be ascertained at the time the will is made, if he is so described that he can be ascertained after the death of the testator. It makes no difference whether a testator, making his will on his death bed gives a legacy of £20 to every servant who is then in his service, or whether, making his will years beforehand, he gives a legacy of £20 to every servant who shall be in his service at the time of his death.

Neither can I see how a bequest to the illegitimate children of a particular woman, who shall be the reputed children of the testator at the time of his death, is more uncertain than a bequest to the illegitimate children of a particular woman, who are the reputed children of the testator at the time he makes his will. In the one case there must be an inquiry whether the children were the reputed children of the testator at the time of his death, and in the other, whether the children were the reputed children of the testator at the time he made his will.

Then, with respect to the authorities, I cannot find that there is any direct authority on the subject. The cases appear to establish that a bequest to the future illegitimate children of a man is void for uncertainty, because the law will not allow evidence to be given that they are the actual children of the man. On the other hand, it seems clear that a bequest to the future illegitimate children of a woman is not void for uncertainty, whether it be or be not void for encouraging immorality, and as being contrary to the policy of the law; and in my opinion a bequest to the illegitimate children

of a particular woman, who shall be the reputed children of the testator, is not more uncertain than a bequest to the future illegitimate children of a woman simply. It occurred to me during the argument that there might be some difficulty in determining at what time it was necessary that a child who was to take should have acquired the reputation of being a child of the testator; but, on consideration, I am satisfied that the material time is the death of the testator. If at that time a child of *Margaret Lewis* had acquired the reputation of being a child of the testator, such child seems to me clearly within the description of the persons who are to take.

I have next to consider whether a bequest to the future illegitimate children of a woman, who shall be the reputed children of the testator, is void on the ground of public policy. I agree that the earlier authorities, and, in particular, *Blodwell* v. *Edwards*, as reported (1), do go a long way to establish that a settlement of property by deed on future reputed children or bastards is void, as being contrary to public policy. *Fenner*, J., is there reported to have said "that they had conferred with divers of the Justices in *Serjeants' Inn*, and that the greater opinion of them was that a remainder to his first reputed son or bastard is not good; because the law doth not favour such a generation, nor expect that such should be, nor will suffer such a limitation for the inconvenience which might arise thereupon." I am not disposed to throw any doubt on the correctness of this opinion. If a man, at the commencement of an illicit intercourse with a particular woman, could make a valid settlement on his expected illegitimate children, this would, I think, manifestly encourage the immoral connection and discourage marriage, which the law favours. The present case, however, is the case of a will, and it is necessary to consider how far the same doctrine applies to wills. Now if a will was so worded as to give a bequest to illegitimate children to be begotten after the death of the testator, I think it would be subject to the same objection as a settlement by deed; and it may be observed that both in *Metham* v. *Duke of Devon* (2) and in *Hill* v. *Crook* (3) the will was the will of a third person, and

(1) Cro. Eliz. 509. May 35 (2) 1 P. Wms. 529.
(3) Law Rep. 6 H. L. 265.

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not of either the father or the mother of the children; and if in those cases the word "children" had been held to include future illegitimate children, it would have included children begotten after the death of the testator, when the will had come into operation. In the present case, the will being the will of the putative father himself, it is impossible that it can encourage an immoral intercourse after his death. If the bequest is to be held to be contrary to public policy, it must be because it tended to promote an immoral intercourse in his lifetime. There was no evidence that *Margaret Lewis* knew that the will was made, and if she did know it she must also have known that it could be revoked at any moment. Then can it be said that the testator himself would be encouraged in immorality by having the power to make a will in favour of his future reputed children? I cannot see that he would, or, at any rate, I think that this is too uncertain to be made a ground of decision. I am of opinion that a will no more comes into operation for the purpose of promoting immorality, or for effecting something contrary to public policy, during a testator's lifetime, than it does for any other purpose.

Then, with respect to the authorities, I do not think they prevent our upholding this will.

In *Wilkinson* v. *Adam* (1) Lord *Eldon* says: "Whether the cases cited from Lord *Coke*, which are all cases of deeds, have necessarily established that no future illegitimate child can take under any description in a will, whether that is to be taken as the law, it is not necessary to decide in this case." Lord *Eldon* seems, therefore, to have thought that there might be a distinction between deeds and wills, and we are now to consider what the distinction between deeds and wills is; and in my opinion the essential distinction between a deed and a will for this purpose is, that a deed operates from its execution, and a will from the death of the testator. I do not think it necessary to go through the other cases; they were, with one exception, cases in which it was held that future illegitimate children were not included in the will at all, or cases in which the will was so worded as to make it necessary to prove that the children were begotten by a particular man. The case which I think an exception is *Howarth* v. *Mills* (2). In that

(1) 1 V. & B. 468. (2) Law Rep. 2 Eq. 389.

case there was a bequest by a woman, who was legally unmarried, to all her children, legitimate or otherwise, and it was held by Vice-Chancellor *Wood* that after-born illegitimate children could not take. As the children to take were the illegitimate children of a woman, there was no uncertainty in the bequest, and the children must also be necessarily born in her lifetime. The judgment of the Vice-Chancellor is in these terms (1): "I cannot doubt that there was an intention on the part of the testatrix to provide for these unfortunate children, and for their sakes I regret that it cannot be carried into effect. The point was mooted in the case of *Wilkinson* v. *Adam* (2), in which Lord *Eldon* threw out some suggestions, but said he would leave the point where he found it, without any determination. Since then the question has been decided by the present Master of the Rolls, the only difference being that in that case the provision was made by the reputed father, whereas here it has been made by the mother; and if it be *contra bonos mores* in a reputed father to provide for after-born illegitimate children, it cannot be less so in the case of a mother. I apprehend that, after the well-known case of *Pratt* v. *Mathew* (3), the policy of the law, that a man cannot make a legal bequest to the future children of his marriage with his deceased wife's sister, is clearly established."

The judgment was, therefore, based entirely on *Pratt* v. *Mathew*. Now in *Pratt* v. *Mathew* a testator left property for his wife for life, meaning his sister-in-law, and after her death for all and every his children thereafter to be born, and it was held by the Master of the Rolls that after-born illegitimate children could not take. This judgment appears to me to be based on two grounds: first, that a gift to future illegitimate children of a man is an insufficient description of the persons who are to take; and secondly, that children in that will ought to be construed to mean legitimate children; and the case seems not to have proceeded at all upon the ground that a gift to the future illegitimate children of the testator is immoral, and contrary to public policy.

Under these circumstances, I cannot think that *Howarth* v. *Mills* (4) is a binding decision upon us, or that the different *dicta*

(1) Law Rep. 2 Eq. 391.
(2) 1 V. & B. 422.
(3) 22 Beav. 328.
(4) Law Rep. 2 Eq. 389.

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on the subject save us from the duty of deciding the case now before us on what we may consider a correct principle. The present will is, in my opinion, so worded that future illegitimate children are undoubtedly included in it, and are sufficiently described without making it necessary to prove that they were begotten by any particular man; and as the only children who can take are children who must have been born, or at any rate begotten, during the lifetime of the testator, I am of opinion that it does not violate any rule of public policy. I am of opinion, therefore, that the Appellant is entitled to succeed.

Solicitor for the Appellant: Mr. *J. Warburton*, agent for Messrs. *Jellicorse & Bates, Manchester.*

Solicitors for the Respondents: Mr. *G. Brown;* Messrs. *Chester, Urquhart, & Co.*

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[1872 P. 100.]

Wills Act (1 *Vict. c.* 26), *s.* 26—*Devise of "Lands"—Leaseholds for Years—Contrary Intention.*

The 26th section of the *Wills Act*, which provides that a general devise of the testator's lands shall include leaseholds, unless a contrary intention appear by the will, was intended to abolish a technical rule which generally defeated the intention, and not to substitute another technical rule in its place. If, therefore, on the fair construction of the will, there are indications of an intention that leaseholds should not pass by the devise of lands, they will be excluded.

A testator, after devising his mansion-house to his wife for life, devised his mansion-house and "lands" in strict settlement. There was a direction to trustees to receive and accumulate the rents during the minority of any tenant for life or tenant in tail by purchase, and to stand possessed of the accumulations upon trust, if such tenant for life or in tail attained twenty-one, or died under that age leaving issue entitled or inheritable under the will, to pay or transfer the funds to such tenant for life or in tail, his executors or administrators, as personal estate, but if such tenant for life or in tail died under twenty-one without leaving such issue, then to lay out the fund in the purchase of freeholds in fee simple to be settled to the same uses as the devised estates. There was a power of sale, and a direction to invest the moneys arising from sales in the purchase of freehold lands to be settled to the same uses, or leaseholds convenient to he held therewith, with a direc-

tion to settle the purchased leaseholds on like trusts, but so that they should not vest absolutely in any tenant in tail by purchase who did not attain twenty-one; but on his death under that age should devolve as if they had been freeholds of inheritance, and been settled accordingly. There was also a bequest of heir-looms to be held on trusts corresponding with the uses of the mansion-house, with a similar proviso against their vesting absolutely in any tenant in tail by purchase who did not attain twenty-one. The testator bequeathed his residuary personal estate to trustees upon trusts corresponding with the uses of the devised estates, with a proviso that it should not vest absolutely in any tenant in tail by purchase dying under twenty-one, but on his death under that age should devolve as if it had been freehold of inheritance included in the devise :—

Held (affirming the decision of *Malins*, V.C.), that there was sufficient indication of an intention not to include leaseholds for years in the devise of lands, and that they passed under the residuary bequest.

THIS was an appeal from a decision of Vice-Chancellor *Malins* on a Special Case on which His Honour decided that leaseholds passed under a residuary bequest of personal estate, and not under a general devise of the testator's lands.

George Barker, by will dated the 21st of January, 1861, gave and devised his mansion-house at *Stanlake*, in *Berkshire*, with the appurtenances, to the use of his wife and her assigns during her life, and subject as aforesaid, he gave and devised the same mansion-house, hereditaments, and premises, and he also gave and devised "all other my messuages, lands, and hereditaments in the county of *Berks*, and also all my lands and hereditaments in the parish of *Padbury* or elsewhere in the county of *Bucks*, and all my messuages, lands, and hereditaments in the county of *Middlesex*, and all other lands and hereditaments (if any), wheresoever situated and being in *England*, belonging to me at my death," to the use of his eldest son *George W. Barker* and his assigns during his life, with remainders to *George W. Barker's* sons and daughters and their children, similar to the limitations afterwards stated with respect to his second son *Alfred G. Barker's* children, with remainder to the Defendant, *Alfred G. Barker*, for life, with remainder to the use of each of the sons of the said *Alfred G. Barker* who should be born during the testator's life, for the life of such son, and after his decease to the use of his first and other sons successively in tail male, so that the elder of the sons of *Alfred G. Barker* to be born during the testator's lifetime, and his

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first and other sons successively and the heirs male of their respective bodies, might take before the younger of such sons and the heirs male of their respective bodies, with remainder to the sons of *Alfred G. Barker* who should be born after the testator's decease successively in tail male, with remainder to the use of the first and other sons of each son of *Alfred G. Barker* born in the testator's lifetime, according to their respective seniorities in tail general, with remainder to *Alfred G. Barker's* sons born after the testator's decease successively in tail general, with remainder to each of the daughters of *Alfred G. Barker* who should be born during the testator's lifetime for the life of such daughter, with remainder to her first and other sons successively in tail, with remainder to her first and other daughters successively in tail, with remainder to the daughters of *Alfred G. Barker* to be born after the testator's decease successively in tail. There followed a set of limitations in strict settlement on the testator's daughter *Emma Blanche Barker* and her descendants, similar to those in favour of *Alfred G. Barker* and his descendants, and after them a set of similar limitations in favour of the testator's son *Charles Henry Barker* and his descendants, with an ultimate remainder to the use of the testator's "own right heirs for ever."

The will contained a power in the usual form for tenants for life to limit jointure rent-charges to their respective wives, and a power to limit the property charged therewith for any terms of years for securing such jointures.

The will then contained a clause empowering the trustees, during the minority of any tenant for life, or tenant in tail male by purchase, or in tail by purchase, to enter into possession or receipt of the rents, and after applying a sufficient sum for maintenance, to invest the surplus of such rents in their names in any of the Parliamentary stocks or funds of *Great Britain*, or at interest upon Government or real securities in *England* or *Wales* (but not in *Ireland*), or on security of leasehold hereditaments in *London* or in the county of *Middlesex* not having less than sixty years to run, and directed them to accumulate the income of such investments at compound interest, and stand possessed of the accumulated fund upon trust, if the tenant for life, or tenant in tail male by purchase, or in tail by purchase, during whose minority the said rents, issues,

and profits should have accumulated, should attain the age of twenty-one years, or die under that age leaving issue entitled or inheritable under the will, to pay or transfer the same to such tenant for life or tenant in tail male, or in tail, his or her executors or administrators, as personal estate of such person, but if the tenant for life or tenant in tail male by purchase, or in tail by purchase, during whose minority such rents, issues, and profits should have accumulated, should die under the age of twenty-one years without leaving issue entitled or inheritable under the will, then upon trust to convert the fund into money and lay out the proceeds in the purchase of lands, tenements, and hereditaments of freehold tenure for an estate in fee simple in *England* (the county of *Berks* to be preferred), and that the hereditaments so purchased should be settled and assured to the like uses as were by the will declared concerning the said hereditaments thereinbefore devised in strict settlement, except the house at *Stanlake*.

The will also contained a power of sale and exchange empowering the trustees during the life of any tenant for life entitled in possession, with the consent of such tenant for life, and also during the minority of any person thereby made tenant for life, or in tail male by purchase, or in tail by purchase, who, if of full age, would for the time being be entitled to the possession or the receipt of the rents and profits, at their discretion, to sell or exchange for other manors, lands, and hereditaments in *England* or *Wales*, all or any of the premises thereinbefore devised in strict settlement, and to invest all moneys which might become payable on any such sale or exchange, "in the purchase of other manors, lands, or hereditaments in *England* or *Wales*, for an estate of inheritance in fee simple, or of lands of a leasehold, or copyhold, or customary tenure, convenient to be held therewith, or with any hereditaments for the time being subject to the existing uses or trusts of this my will." And the testator declared that the trustees should settle and assure all such of the manors, lands, or hereditaments so to be purchased or taken in exchange as should be freeholds of inheritance to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisions, and directions to, upon, for, with, under and subject to which the hereditaments, by the sale or exchange of which the purchase-money

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of the hereditaments so as aforesaid directed to be settled should have arisen, or in exchange for which the hereditaments so as aforesaid directed to be settled should have been received, would, in case the same had not been sold or given in exchange, have stood settled; and should settle and assure all such of the said manors, lands, or hereditaments so to be purchased or taken in exchange as should be of leasehold, copyhold, or customary tenure, upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisions, and declarations as should or might correspond with and be similar to the uses, trusts, intents, purposes, powers, provisions, and declarations to, upon, for, under, and subject to which the hereditaments, by the sale or exchange of which the purchase-money of the hereditaments so as last aforesaid directed to be settled should have arisen, or in exchange for which the hereditaments so as last aforesaid directed to be settled should have been received, would under the will, if not so sold or given in exchange, have stood settled and assured, or as near thereto as the different tenure and quality of the premises, and the rules of law and equity would admit of. "And so that if any of the lands purchased or taken in exchange shall be held by a lease for years, the same shall not vest absolutely in any person hereby made tenant in tail male by purchase, or in tail by purchase, who shall not attain the age of twenty-one years; but on his or her death under that age, shall go, devolve, and remain in the same manner as if they had been freeholds of inheritance, and had been settled accordingly."

The will also contained the following bequest:—"I bequeath all my pictures, prints, books, plate, glass, china, ornamental and other clocks, articles of linen, household goods, furniture and effects whatsoever, which at my decease shall be in or about my said mansion-house at *Stanlake*, unto the said" [trustees], "in trust to permit the same to go along with and be used and enjoyed, so far as the rules of law and equity will permit, by the person or persons who, under or by virtue of this my will, shall for the time be in the possession of, or entitled to the receipt of, the rents, issues, and profits of the said mansion-house hereby devised in strict settlement; yet so that the same shall not vest absolutely in any person hereby made tenant in tail male by purchase, or in

tail by purchase of the said mansion-house, unless such person shall attain the age of twenty-one years; but on the decease of any such person, being tenant in tail male by purchase, or in tail by purchase, under this my will, shall go, devolve, and remain in the same manner as if they had been freeholds of inheritance, and had been included in the devise in strict settlement herein contained of the said mansion-house."

The will then contained the following residuary bequest:—"I give and bequeath all the money, securities for money, goods, chattels, and personal estate of or to which I am or at my death shall be possessed of or entitled, either at law or in equity, or of which I have, or at my death shall have, power to dispose by will" to his trustees, "upon trust, at their discretion, either to permit the same or any part thereof to remain in its actual state of investment so long as they should think fit, or to convert the same into money and invest such money in their names upon Government or real securities in *England* or *Wales*" (but not in *Ireland*) "or on the security of leasehold houses or hereditaments in *London* or the county of *Middlesex*, held for terms of years, not having less than sixty years to run at low ground rents," or in certain stocks or shares therein mentioned. And the testator declared that his trustees should stand possessed of his said residue, stocks, funds, and securities, and the income thereof (subject to the payment of a certain annuity, and to a trust for accumulating £1500 a year for twenty years from his decease), and of the funds to arise from such accumulation, upon such trusts as should correspond with and be similar to the uses, trusts, &c., thereinbefore declared concerning the hereditaments thereinbefore devised in strict settlement; "so nevertheless that the said residuary estate, accumulations, and premises shall not vest absolutely in any person hereby made tenant in tail male by purchase, or in tail by purchase, of the same hereditaments and premises, unless such person or persons shall attain the age of twenty-one years; but on the decease of any such person, being tenant in tail male by purchase, or in tail by purchase, under or by virtue of this my will, shall go, devolve, and remain in the same manner as if they had been freeholds of inheritance, and had been included in the devise in strict

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settlement hereinbefore contained of the same hereditaments and premises."

The testator made a codicil, dated the 18th of July, 1865, by which he revoked the limitations in favour of *C. H. Barker* and his descendants, he having died without issue, and in default of issue of his said sons *G. W. Barker* and *Alfred G. Barker*, and of his daughter *Emma B. Barker*, under the limitations contained in his will, who should attain twenty-one or marry, devised his said estate, real and personal (subject to the powers therein contained), instead of the devise for the use and benefit of his own right heirs as named in his will, to the use and for the benefit of his said sons, *George W. Barker* and *Alfred G. Barker*, equally to be divided between them, and their respective heirs, executors, and administrators, absolutely and for ever.

The testator died in November, 1868, and his will and codicil were proved in January, 1869.

The testator's eldest son, *George W. Barker*, died in September, 1869, without having been married.

The testator's second son, *Alfred Gresley Barker*, had three children, all of whom were infants. Two of them were born in the lifetime of the testator, and one after his death.

The testator was at the date of his will and of his death possessed of large real estates, and also of certain leasehold hereditaments, producing a gross rental of about £760 per annum, situate in *Paddington*. These leaseholds were held for terms of years, of which about seventy were then unexpired.

The question was whether these leaseholds passed under the residuary bequest or under the devise of the testator's messuages, lands, and hereditaments, in which latter case the interest of a tenant in tail in them would not be defeated by his dying under twenty-one, and they would not be subject to a trust for conversion. Vice-Chancellor *Malins* having decided that they passed under the residuary bequest, *Alfred Gresley Barker* and his children, who were born in the testator's lifetime, appealed (1).

(1) 1873. Dec. 17.

SIR R. MALINS, V.C.:—

This is a special case stated for the opinion of the Court upon the question whether, by a particular clause in the will of Mr. *George Barker*, who was a solicitor of this Court, of great emi-

Mr. *Bristowe*, Q.C., and Mr. *Cust*, for the Appellants:—

By 1 Vict. c. 26, s. 26, these leaseholds must pass by the general devise unless a contrary intention appears by the will. We submit

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nence and long-standing, his leasehold estates have passed.

The will is dated in 1861. It is a will, therefore, to which the provisions of the *Wills Act* of the 1st Vict. c. 26, apply. The testator had considerable freehold estates, and also leasehold estates, as I understand, in the parish of *Paddington*, and by his will he says, "I give and devise the mansion-house, hereditaments, and premises, and I also give and devise all other my messuages, lands, and hereditaments in the county of *Berks*, and also all my lands and hereditaments in the parish of *Padbury* and elsewhere in the county of *Bucks*, and all my messuages, lands, and hereditaments in the county of *Middlesex*, and all other lands and hereditaments (if any) wheresoever situated and being in *England*, belonging to me at my death, to the use of my eldest son, *George William Barker*." He gives it to his eldest son for life, then to his issue in tail male and tail general, with remainder to his second son and to his issue for life in tail male, and then to his daughter in the same manner, and he winds up by making a devise to his own right heirs. He also provides that in the case of any person being made tenant in tail born in his lifetime, he shall not be tenant in tail, but tenant for life, with remainder to his or her issue. That, therefore, is a will which shews an intention on the part of the testator to tie up his property as long as the rules of law and equity will permit.

Having made this devise, which may be considered as a devise of all his lands and hereditaments in the county of *Middlesex* and elsewhere, and having given these lands in this very strict manner, the question is, whether that passes the leasehold property which he had for seventy years unexpired. Now the *Wills Act* is very express in its provisions. The 26th section says, "Be it enacted that a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary copyhold or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary copyhold and leasehold estates of the testator, or his customary copyhold and leasehold estates, or any of them to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will."

This, therefore, devises the lands and hereditaments in every part of *England*, and will certainly pass the leasehold estates in question, unless by the will some contrary intention shall appear.

Now if the testator had ended his will with the ultimate remainder to his own right heirs, I am perfectly clear that there is nothing in the will up to that point to shew a contrary intention; and then, not only by the express words of the section which I have just read, but by the interpretation which has been put upon that section in the celebrated case of *Wilson* v. *Eden* (11 Beav. 237; 5 Ex. 752; 14 Beav. 317; 12 Q. B. 474; 16 Beav. 153), first by the Court of Exchequer on the special case sent by the Master

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that there is here no such proof of contrary intention as will take the case out of the statutory rule. The case is governed by *Wilson* v. *Eden* (1). For the Court to give effect to the trifling circum-

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of the Rolls; secondly, by the Court of Queen's Bench, and finally confirmed by Lord *Romilly* when Master of the Rolls, it is settled that although there is a general devise or bequest of the lands of the testator to one for life, with remainder to his issue in tail, with remainder over, the inconvenience which would arise from holding that the leasehold property would vest in the first tenant in tail from the moment of his birth will not operate against the general devise; if, therefore, there had been nothing more in this will than the devise of these lands to his sons and to their family in succession, and then to his daughter in the manner I have mentioned, I am clearly of opinion, not only by the words of the will, but by *Wilson* v. *Eden*, followed as it has been by other cases, that I should be bound to hold that these leasehold estates would pass, though the consequences would be to vest them in the first tenant in tail who was born, absolutely, and would render all the subsequent limitations inoperative. But the statute says "that they are to pass unless a contrary intention shall appear by the will." Now how is that to be shewn? Mr. *Bristowe* has argued that a testator must say so; but if that had been the intention of the Legislature the language would have been different. It would then have been, "unless the testator shall express a contrary intention." Here it is, "unless a contrary intention shall appear by the will." What is the meaning of that? It must be that the Court, having the construction of the will to determine, must be satisfied by regarding every part of it, either from one part or from all the parts taken together, and be able to draw the conclusion that the testator did not intend, under a general devise of lands and hereditaments, to pass the leasehold property. Accordingly, in this case, Mr. *Cotton* very properly conceded that if the will had been as I have mentioned, and if it had stopped after the limitation to the right heirs, that would not be sufficient to shew the contrary intention, because the same limitations occur in *Wilson* v. *Eden*, so that the property would vest in the first child that was born, absolutely in tail. In that case the ultimate limitation was to Sir "*William Eden* and his heirs and assigns." The same argument was raised in that case as has been raised here. It was said there was a clear intention that only the real estate should pass. The argument was rejected, and I should have been bound to reject the argument in this case were it not for the fact that by other parts of this will my opinion is that the testator has shewn a sufficient indication of intention that this property should not pass by the general devise. Now whatever he did intend to pass by the general devise, over that property he has given powers of sale and exchange, and he has provided that the moneys arising from the sale may be invested in the purchase of other lands of a freehold nature, or leasehold estates conveniently situated to be held therewith. If it had stopped there it would have been "the proceeds of freeholds or leaseholds convenient to be

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(1) 11 Beav. 237; 5 Ex. 752; 14 Beav. 317; 18 Q. B. 474; 16 Beav. 153.

stances in favour of the Respondents in this will, after getting over the great difficulty arising from the inapplicability of limitations in strict settlement to leasehold estates, would be straining at

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held therewith to be invested on the same trusts." That would not have altered the effect of it.

But then it goes on to provide that if leasehold estates are bought—that is, bought under the general devise in strict settlement—then they are to be settled in such a manner as that they are to go exactly as the estates sold would have gone, and he has then expressly provided that they shall not vest in any person made tenant in tail who shall die under the age of twenty-one years; therefore distinctly shewing that he did not intend that the leaseholds should pass, because if they had passed by this devise they would have vested in the first tenant in tail; and the consequence is that the property which is sold is not to go to the first tenant in tail, but is by this expressly directed to be tied up in such a manner as that it is not to vest in any tenant in tail by purchase who does not attain the age of twenty-one years. Now, therefore, if I had thought that he had passed his leasehold estates before, that shews to my mind that he would have inserted a similar clause, that the leasehold estates comprised in the proviso should not vest in any person made tenant in tail who should not attain the age of twenty-one years. That is one circumstance from which, I think, it may fairly be concluded what his impression was (and his impression was no doubt his intention) as to the leasehold estates passing by that devise.

Another circumstance, which Mr. *Cotton* very strongly adverted to, was, that when he comes to an accumulation clause he says that during the minority of any person made tenant in tail the rents are to be accumulated, and by using that expression, "the minority of the person made tenant in tail," I think he shews that he knew perfectly well that a tenant in tail dying under age could not dispose of an estate tail, but that it would go over, under the limitations contained in his will, to the issue of that tenant in tail if he died leaving issue, if not it would go over to the next one in the line of limitations; but he provides that the rents and profits during the minority of the tenant in tail are to be accumulated, and the accumulations are again to be laid out in land; but they again are so to be settled that the produce of these accumulations are not to vest in any tenant in tail by purchase who has not attained the age of twenty-one years.

Then another circumstance is this: He gives his chattels in strict settlement. He bequeaths his pictures, prints, books, plate, glass, china, ornamental and other clocks, articles of linen, household goods, furniture, and effects whatsoever, which at his decease shall be in or about his mansion-house of *Stanlake*, to trustees on trust to go with the real estate. They are all to go together, but that again provides, "so that the same shall not vest absolutely in any person hereby made tenant in tail male by purchase or in tail by purchase of the mansion-house, unless such person shall attain the age of twenty-one years, but, on the decease of any such person being tenant in tail male by purchase, or in tail by purchase, under or by virtue of this my will, shall go, devolve, and remain in the same manner as if they had been freehold of inheritance, and had been

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a gnat after swallowing a camel. *Reeves* v. *Baker* (1) is in favour of giving a wide effect to a general devise. The alteration of the

included in the devise in strict settlement."

Then we come to that clause which is very material, if I am right in considering that these leaseholds did not pass by the special devise which I have referred to of the general estate. He now gives his general residuary personal estate in these terms: "I give and bequeath all the money, securities for money, goods, chattels and personal estate of or to which I am or at my death shall be possessed of or entitled to either at law or in equity, or of which I have or at my death shall have power to dispose of by will, unto the trustees on trust either to permit and suffer the same or any part thereof to remain in its actual state of investment." Of course Mr. *Bristowe* has very properly conceded that if the leaseholds do not pass under the first clause they will pass by this, under the description of personal estate. But an observation was made that it could not apply to the leasehold estates because he speaks of the present investment, and a man would hardly speak of leaseholds in this sense—to remain in their present state of investment: but *reddendo singula singulis*, I am of opinion that those words apply to the part of the property which is, strictly speaking, so invested, and that it would pass that part of his property which is otherwise not disposed of.

Now what are they to do with his personal estate? They are to collect it, and it is to remain in the same state of investment, or it is to be put into other investments. Then what is to be done? It is to be held by the trustees in such a manner as that it is to go in strict settlement. They may also lend the money on leaseholds not having less than sixty years to run, and then they are to hold it in strict accordance with the limitations contained therein, of his real estate, so that whoever is entitled to the real estate is also to be entitled to the personal estate. But then, again, comes this provision: "shall not vest absolutely in any person hereby made tenant in tail male by purchase, or in tail by purchase, of the same hereditaments and premises, unless such person or persons shall attain the age of twenty-one years; but on the decease of any such person being tenant in tale male by purchase, or in tail by purchase, under or by virtue of this my will, shall go, devolve, or remain in the same manner as if they had been freeholds of inheritance and had been included in the devise in strict settlement hereinbefore contained." Now if the testator was so anxious, first, that the accumulations of his real estate should not vest, then that his heir-looms should not vest in any person made tenant in tail, and, thirdly, that his general personal estate should not vest, what an absurdity it would be to suppose that he intended his large leasehold estates should vest, and that he should make no such provision as to them as he had done with regard to the others.

Therefore I look at every part of the will, and I see that he could not have intended the leaseholds to pass by the first gift, but that he intended them to pass by the second gift, and that they were to be held on the same trusts as his general real estate, so that they

(1) 18 Beav. 372. 18 Jur. 589.

ultimate limitation by the codicil is a strong argument for including leaseholds.

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should not vest in any person made tenant in tail who should not attain the age of twenty-one years.

Then Mr. *Bristowe* says there is a codicil, and that the codicil makes a difference, because by his will he had wound up by a limitation to his own right heirs, and now, by the codicil executed in 1865, and reciting the limitations contained in his will with regard to his real estate, he says, instead of the devise "for the use and benefit of my own right heirs, they are to go to the benefit of my sons"—that is, everything he had given before; the words are: "To the use and for the benefit of my said sons *George William Barker* and *Alfred Gresley Barker*, equally to be divided between them and their respective heirs, executors, and administrators, absolutely and for ever." Mr. *Bristowe* argued that that shews that he knew very well that in the original devise there was real and personal property, because he gives it to his heirs, executors, and administrators; but that argument, I think, entirely falls to the ground when it is considered that he had given his personal property to be held in the same manner as his real estate. The ultimate limitation with regard to that will be to his right heirs, which will mean next of kin or legal personal representatives, but now he substitutes his two sons. By the first part of the will he had given the real estate, by the second part he had given the personal estate, and as to both he now says, "I give it to them and their heirs"—that is, the real estate; "and their executors"—that is, the personal estate. Therefore that fully explains it.

Now, therefore, upon these clauses, being, as I am, bound in all cases of construction of written instruments, to look at the instrument in every part of it to ascertain what the intention of the parties is—looking at every part of this will, and seeing the inconvenience that would arise from allowing the property to vest absolutely in the first tenant in tail who came into *esse*, so that the consequence would be that if *George William*, the first son, had had a child who died an hour after its birth, the property would have vested in him—although I agree with Mr. *Bristowe* that that would not have been sufficient, yet that is an objection which was overruled in *Wilson* v. *Eden*, and that alone would not have done; but when I find such anxious provisions to prevent that consequence happening, I come to the conclusion that it was not inserted with regard to the property comprised in the first devise because he considered that he had only passed the real estate, and that with regard to such real estate no such provision was necessary, as it would not vest in any tenant in tail who did not attain the age of twenty-one years and had not executed a disentailing deed. That knowledge I must attribute to the testator, and therefore, the statute not requiring that there should be any express intention, but it being only a "contrary intention" to be collected from the whole will, I come to the conclusion that there is a contrary intention shewn by this will.

The first question, therefore, will be answered in the affirmative, and the second in the negative. And with regard to the third question, I am of opinion that the trustees may postpone the sale and conversion of the leasehold estate for the present. It appears that the leasehold estates produce a gross

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Mr. *Whitehead*, and Mr. *Bryce*, for the trustees.

Mr. *Cotton*, Q.C., and Mr. *C. Comyns Tucker*, for the child of *Alfred Gresley Barker* born after the testator's death, were not called upon.

LORD SELBORNE, L.C.:—

We are of opinion that the Vice-Chancellor's judgment and decision in this case are clearly right.

The argument of the Appellants is founded on the 26th section of the *Wills Act;* but as we understand it, the object of that section was to abrogate a merely technical rule tending, in many cases, to defeat the intention of testators using language in its natural sense, and not to establish another technical rule which, in particular cases, might have a like effect in the contrary direction. The intention is to be regarded, and the only effect of that section is, in conformity with what was considered by the Legislature to be the natural *primâ facie* use of language, to shift the *onus probandi*, and to throw it on those persons who deny that in a will "lands" are meant to include leasehold estates in land. To that extent, of course, the statute operates in the Appellants' favour, because the word "lands" being found in the part of the will under which the Appellants claim, the effect of the statute is to throw on the other side the *onus probandi*, that the word "lands" does not include the leaseholds in question. But when that *onus probandi* is thrown on the other side, all that they have to do is to shew to the Court from the whole will sufficient grounds to satisfy a reasonable man that the intention of the testator was not by the word "lands" to pass the leasehold estates. In *Wilson* v. *Eden* (1), it is laid down by the Court of Queen's Bench that, in acting under that section, the Court is not to look to any

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rental of about £762 per annum, and that they are held for long terms of years, of which about seventy years are now unexpired, and that they have increased in value since the death of the testator. Upon that statement I am of opinion that they are at perfect liberty to retain them for at least twenty years if they think that the property is still likely to increase in value. The third question will, therefore, be answered in the affirmative.

(1) 18 Q. B. 474.

technicalities, but to collect the intention from the whole will—a sound maxim in all cases. I was reminded, by the nature of the argument on the other side, of a somewhat parallel, although converse case, not depending on the statute—*Coard* v. *Holderness* (1)—where a testator gave all his estate, effects, and property, whatsoever and wheresoever, which he was or might be possessed of or entitled to, upon trust for his children, plainly throwing on the heir-at-law the *onus probandi* to shew that the real estate did not pass. That *onus probandi*, in the case of *Coard* v. *Holderness*, was held to be satisfied by a process similar in principle to that which the Vice-Chancellor has applied, and which we apply to the present will; that is, by looking at all the subsequent parts of the disposition, and seeing whether you would or would not, by holding the gift, (as *primâ facie* it ought to be held,) to include real estate, produce inconsistency, and be defeating and departing from the intention indicated by expressions occurring from time to time in subsequent places. The Master of the Rolls in that case stated thus the principle on which he proceeded, which I think is equally applicable here (2):—"I am of opinion that the burthen of proof is thrown upon the heir-at-law to shew that these words are, according to the settled rules of construction, to be cut down so as to include personal estate only. I think that the rest of the will does justify the Court in coming to the conclusion that these words were intended to be confined to personal estate. The view I take of this case is this: that these words are to be construed with due regard to the general scope and object of the testator, and that for this purpose the whole will must be looked at together."

Looking at the present will, the first thing to be considered is the fact, which, and which alone, is common to the present case and *Wilson* v. *Eden*, that the gift, in which the Appellants contend that the leasehold estates are included, is a gift to uses in strict settlement, which, in their entirety and integrity, cannot be applied to leasehold estates, but must, more or less, fail—that is, fail from the time at which the first tenant in tail is reached; there they must stop by the irresistible operation of law as to the leasehold estates, while they would go on as to the freeholds. The whole intention, therefore, apparently indicated by such a settle-

(1) 20 Beav. 147. (2) 20 Beav. 152.

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ment, is capable of taking effect as to the freehold estates, but is not capable of taking effect as to the leasehold estates. Lord *Langdale* appears to have thought, in *Wilson* v. *Eden* (1), that this alone was a sufficient ground for holding that the intention could not be to include leasehold estates, and Mr. *Cust* urged that overcoming that difficulty was like swallowing a camel, and that all the other difficulties in this will are, in comparison to it, but as gnats. I think that Lord *Langdale*, who was an eminent Judge, had at least this reason for his opinion—that a construction which cannot take effect equally as to all the subjects of the gift when they are blended together is probably and *primâ facie* one which had not presented itself to the mind of the testator as involving that result. The Courts of Law, however, and eventually this Court, came to the conclusion, that the fact of the devise being to limitations in strict settlement was not by itself sufficient to exclude leaseholds; and the argument now seems to be that, because it is not sufficient when standing alone, it is to have no weight at all when accompanied by various other indications in the context of the will. I am not surprised that the Courts of Law should have come to the conclusion arrived at in *Wilson* v. *Eden*. It is not at all necessary for me to express any opinion as to that authority, by which undoubtedly we are bound; but I am not surprised at it, because we know that in other cases not depending upon statute —such as *Forth* v. *Chapman* (2)—the Courts of Law had become accustomed to very violent divorces of different kinds of property, which the testator had dealt with by a single disposition, and which he apparently had intended to go together. But, admitting that limitations in strict settlement would not by themselves sufficiently discharge the burden of proof here lying upon the Respondents, what is the present will?

The first thing that strikes us in this will, and which is entirely different from anything in *Wilson* v. *Eden*, is this—that whereas in *Wilson* v. *Eden* there was a gift of land in strict settlement to one set of persons, and a gift of the testator's residuary personal estate absolutely to another person, here we have on the whole will the most perfect evidence of intention on the part of the testator to keep his whole estate, personal as well as real, together,

(1) 11 Beav. 237. (2) 1 P. Wms. 663.

and make the whole, by the most effectual legal means which he could employ, the subject of one strict settlement in favour of one designated succession of persons, whom he intended to take beneficially one part as well as the rest, as far as possibly could be done consistently with the rules of law and equity. When we follow that scheme in detail, we find, as it appears to me, almost at every step where we could possibly look for special indications of purpose, indications of a purpose inconsistent with that separation and divorce of the leaseholds from the freeholds which would be the practical result of the success of the Appellants' argument. There is a clause, the force and effect of which I had not distinctly perceived until it was drawn to our attention in reading the judgment of the Vice-Chancellor, which furnishes a strong argument as to the testator's intention. It is this—that as often as any person, who under the previous words was designated as tenant for life or tenant in tail by purchase, should be under the age of twenty-one, the testator's trustees should enter into the possession or the receipt of the rents, issues, and profits of the same premises —evidently all and every part of them—and receive and invest and accumulate, subject to maintenance and proper charges, the whole of those rents during the minority of the tenant for life or tenant in tail by purchase, and if that person attained twenty-one, then pay over to him the accumulated rents, and if he died under twenty-one, then invest those accumulated rents in the purchase of freehold land to be settled to the same uses. It seems difficult, if not impossible, to reconcile the operation of that clause with the argument, which, as soon as ever a tenant in tail comes into *esse*, vests in him absolutely the whole of the leaseholds, there being in this part of the will no provision whatever to prevent leaseholds, if they pass by the words, from vesting absolutely in the first tenant in tail at the moment of his birth, or at the moment of the testator's death, as the case might be. That is the first indication, and I think it a very strong one. The second is furnished by the power of sale, which applies to the whole property; and so, if leaseholds pass, to leaseholds as much as to freeholds:—the proceeds of sales under that power of sale are to be invested "in the purchase of other lands or hereditaments in *England* or *Wales* for an estate or estates of inheritance in fee simple, or of lands of a leasehold

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or copyhold or customary tenure, convenient to be held therewith" —the first place in which leaseholds are expressly mentioned in the will, except in a clause referring to them as a security on which money might be lent, which is not material. The testator, therefore, authorizes an investment, not in any leaseholds, but in leaseholds convenient to be held with the settled estates, of money that might have arisen from a sale of part of the settled estates; and he goes on to distinguish what is to be done in the case in which freeholds are purchased, and in the case in which leaseholds, copyholds, or customary estates are purchased. If freeholds of inheritance are bought, they are to be settled to the same uses to which the hereditaments, by the sale or exchange of which the purchase-money should have arisen, previously stood settled; the word "hereditaments" alone being used as signifying the subject-matter of the sale, but which might be anything that was part of the settled estates, and "hereditaments" being a word which, after the statute, as I conceive, as well as before, means heritable property. If the property purchased is freehold of inheritance, it is to be settled to the same uses; but if it is of leasehold, copyhold, or customary tenure, then it is to be settled in a different way. [His Lordship here read the trust for settlement of the customary copyhold and leasehold estates, with the clause preventing leaseholds for years from vesting absolutely in a tenant in tail dying under twenty-one.] Now let us consider the effect of that. If leaseholds for years were included in the settlement, and were sold under the power of sale, the proceeds of that sale could not be invested in other leaseholds to be settled on the same trusts as the leaseholds which had been sold, but upon different trusts, which would prevent a tenant in tail by purchase from taking absolutely if he died under twenty-one. There is an equally careful provision to prevent the heir-looms in the mansion-house from vesting absolutely in a tenant in tail dying under twenty-one; but I agree that, as the reference there is to the limitations of the mansion-house, and not of the other property, that argument has not in all points the same cogency.

Lastly, we come to the gift of all the testator's personal estate, which most clearly includes the leaseholds if they do not pass under the previous gift. Directions are given for allowing it to

remain in its actual state, or to convert it and invest the proceeds on such stocks, funds, or securities as therein mentioned; directions are given for payment of an annuity, and for the accumulation of £1500 a year to form an accumulated fund; and, subject to these directions, the whole residuary personalty, including the accumulated fund, is to be held upon trusts corresponding with the uses of the estates devised in strict settlement, with a proviso preventing its vesting absolutely in any tenant in tail by purchase who does not attain twenty-one. To my mind, there is in every one of those clauses a distinct, and in the whole of them a cumulative, indication of intention that leaseholds should not pass by the specific devise in the settlement, but should pass by the ultimate gift of the personal estate; and therefore I am of opinion that the Vice-Chancellor's decree must be affirmed with costs.

SIR W. M. JAMES, L.J.:—

I am of the same opinion. I cannot say that I do not to some extent agree with Mr. *Cust* when he says that a camel was swallowed in the case of *Wilson* v. *Eden*.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I do not know that I quite agree with that last observation, because I think that if the testator in *Wilson* v. *Eden* had been asked whether he intended the leaseholds to go with the freeholds, he would have said, "Yes," and that if the present testator had been asked the same question, he would have said, "No."

The LORD JUSTICE JAMES:—I agree in that remark.

Solicitors: Messrs. *Bowker, Peake, & Bird.*

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and L. JJ.

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Dec. 11, 12, 15, 16.

In re MOTION.
MAULE *v.* DAVIS.

[1872 M. 217.]

Bankruptcy—Jurisdiction—Partnership wound up in Chancery—Order for Sale of Partnership Business—Bankruptcy Act, 1861, *s.* 137—*Bankruptcy Act,* 1869, *s.* 72—*Alleged Misconduct of Assignee—Bill by Purchaser offering to give up his Purchase on being repaid his Purchase-money and Interest.*

9 C.P. 675
2 Ch.D. 53
6 Ch.D. 337
11 Ch.D. 149
4 App.Cas. 141

One of the partners in a distillery business filed a bill in Chancery against his co-partners for the dissolution of the partnership, and a decree was made for a dissolution, and afterwards an order was made for a sale of the business and property as a going concern by public auction. During the progress of the suit the Plaintiff became bankrupt, and the creditors' assignee sold the bankrupt's interest in the partnership property to his co-partners, and procured an order of the Court of Chancery sanctioning the sale. The co-partners then sold the whole business to a purchaser, and the creditors were paid 20*s.* in the pound out of the purchase-money. New assignees were afterwards appointed, who obtained an order in the Court of Bankruptcy, at the instance of the bankrupt, to set aside the sales as being made collusively, and at an undervalue:—

Held, on appeal (reversing the order of the Chief Judge), that there was no breach of trust on the part of the assignee in selling the share of the bankrupt partner by private contract, and that there was no proof of collusion in obtaining the order for sale; but it appearing to the Court that the valuation of the property for the purpose of the sale had in some respects been made on an erroneous principle, a reference was directed as to the true value of the property, the purchaser consenting to pay any excess which might be found due from him on such reference:

Held, also, that the 137th section of the *Bankruptcy Act*, 1861, does not apply to a sale of a bankrupt's interest in a partnership of which some of the partners are solvent:

Held, also, that the 72nd section of the *Bankruptcy Act*, 1869, does not enable the Court of Bankruptcy to draw within its jurisdiction property or the owners of property not vested in the trustee, and not originally subject to the administration in bankruptcy; and *à fortiori* does not authorize that Court to work out a decree which has been made in Chancery against such persons.

GEORGE MOTION, who afterwards became bankrupt, carried on the business of a distiller in partnership with *John Hay* and *Edward Netterville Briggs*. By the partnership articles the profits were to be divided into twentieths, of which *Motion* was entitled to nine, *John Hay* to five, and *Briggs* to six. *Motion's* share of the

capital was stated in the articles to be £12,000, *John Hay's* £10,000, and *Briggs'* £12,000.

In January, 1864, *John Hay* filed a bill in Chancery against his partners, praying for a dissolution of the partnership, and seeking to charge *Motion* with a sum of £6000 in taking the partnership accounts, for which sum, however, the Vice-Chancellor decided he was not liable. In April, 1864, a cross bill was filed by *Motion* against his partners, also praying for a dissolution of the partnership; and in the same month a decree was made in both suits, whereby it was ordered that the partnership should be dissolved as from the 30th of April, 1864, and accounts were directed to be taken of the partnership dealings and transactions. It was also ordered that the business, property, and effects of the partnership should be sold as a going concern, with the approbation of the Judge, and each of the partners was to be at liberty to bid at the sale. A receiver was appointed to collect the debts and to manage the business.

The business had formerly belonged to *William Hay*, and he sold it to *Robert Burdett* on behalf of the three partners. At this time there were debts due to *William Hay* from his customers and others which were not included in the sale. The collection of these debts was entrusted by him to the three partners, his successors; and in respect of moneys received by them on account of these debts they became indebted to him in a considerable sum. He filed a bill against them and *Burdett*, and in July, 1864, he obtained an order for the payment to him by the Defendants of a sum of £6000. This order not having been obeyed, *William Hay* issued attachments against *Motion*, *Briggs*, and *Burdett*, to enforce it. One only of the attachments was executed, and that was against the bankrupt *Motion*, who, in March, 1865, was arrested and lodged in *Whitecross Street* prison. On the 31st of May, 1865, while he was in prison, he was adjudicated a bankrupt on a debt alleged to be due to *Burdett*, to which, however, Mr. *Frederick Moojen*, an attorney, was beneficially entitled. *Moojen* was the brother-in-law of *Briggs*, and he had, before and after the formation of the partnership, acted as the solicitor of *Motion*. He had appeared for and acted as the solicitor of *Motion* in the partnership suits for some time, but had ceased so to act before *Motion's* arrest.

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In consequence of *Motion's* bankruptcy, the proceedings for the sale directed by the decree were stayed.

On the 15th of July, 1865, *J. Johnstone* was appointed creditors' assignee in the bankruptcy. He accepted the office at the request of *Moojen*, at whose request also he appointed Mr. *Chidley* his solicitor. Subsequently *Moojen* became dissatisfied with him, and after the matter had been considered at several meetings of creditors, *Johnstone* was removed, and *Thomas Cooper Coxon*, who represented creditors to a large amount, was appointed assignee in his place, and the appointment was confirmed by the Commissioner.

In December, 1865, an offer was made by a person named *Tabernacle*, who was said to have been an agent of the bankrupt, to buy the business and the lease and plant of the distillery for £23,000, but the offer was objected to by the other partners and was withdrawn. *Coxon* was then made a Defendant to the Chancery suits, and the proceedings for a sale were resumed.

An offer was made on behalf of *John Hay* and *Briggs* to purchase the bankrupt's interest for £15,000, but it was rejected by the assignee. In July, 1868, *John Hay* and *Briggs* carried into Chambers a proposal to purchase the entirety of the partnership property for £30,000. That offer was opposed by *Coxon* as inadequate, and on the 31st of July, 1868, an order was made that the whole of the partnership premises, plant, and effects, should be sold by public auction as a going concern; that *John Hay* should have the conduct of the sale, but that neither he nor *Briggs* should have liberty to become purchasers; and that *John Hay* should sell the debts due to the partnership, with the approbation of the Judge, the proceeds to be paid into Court to the credit of the two causes.

In August, 1868, *R. W. Motion*, a brother of the bankrupt, entered into communication with *Moojen*, and it was proposed in the course of these negotiations that all matters in difference should be settled by arbitration without the intervention of legal advisers, and that Mr. *George Maule*, who had advanced money to and become surety for the partners, should be arbitrator for *J. Hay* and *Briggs*, and that a Mr. *States* should be arbitrator for the bankrupt and his assignee.

In January, 1869, Mr. *Coxon* died, and on the 19th of February, 1869, Mr. *Staunton* was appointed assignee in his place. He had been solicited to become assignee by *Moojen*, who had interested himself to procure his election, and in particular had induced *Maule* to prove in the bankruptcy for a debt of £5000 which was due to him from the partnership, in order to be enabled to vote at the meeting of creditors. Mr. *Staunton* appointed Mr. *Chidley* his solicitor.

The negotiations for a reference to arbitration, however, still continued, and on the 15th of March, 1869, Messrs. *Linklater & Co.*, who were then acting as solicitors for the bankrupt, sent to *Moojen*, and also to *Chidley*, the draft of an agreement for reference to the arbitration of *Maule* and *States*. On the 16th of April *Moojen* wrote to Messrs. *Linklater* a letter, in which he said, "We believe the necessary steps are being taken to pass the receiver's accounts, and when that is done we do not see the slightest difficulty in bringing matters to a satisfactory conclusion." On the 19th of the same month Mr. *Chidley* returned to Messrs. *Linklater* the draft agreement for reference, with a letter, in which he intimated that he could not advise the assignee to consent thereto.

Up to this time the bankrupt and his advisers believed that the reference would proceed. However, in fact, on the 15th of April, 1869, before either of the last-mentioned letters was written, *Staunton* had entered into an agreement with *Briggs* and *John Hay* for the sale to them by private contract of the bankrupt's interest in the partnership property. This agreement contained a recital that *Staunton* had agreed, at the request of the majority of the creditors of the bankrupt, notwithstanding the order of the 31st of July, 1868, to enter into the agreement thereinafter expressed, and by it *Staunton* as assignee agreed that he would, subject to the approbation of the Judge, sell to *Briggs* and *John Hay*, and they agreed to purchase, all the estate and interest of *Staunton* as assignee of and in the partnership assets, at the price and in manner thereinafter mentioned; that, in the event of the amount of the purchase-money not being agreed upon by mutual consent between the parties, the accounts of the partnership should be taken by the Chief Clerk in the suits, and that the amount which the Chief Clerk should ascertain and fix as the value of the

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estate and interest of *Staunton* as assignee in the partnership assets should be deemed and taken to be the price which should be paid to him by *Briggs* and *John Hay* for the estate and interest thereby agreed to be purchased; and that a deposit of £2000 in part payment of the purchase-money should be paid to *Staunton* by *Briggs* and *John Hay* on the execution of the agreement, and the balance should be paid within one month from the time when the value of such estate and interest should have been ascertained and fixed as aforesaid.

Consequent upon this agreement, Messrs. *Good & Daniel*, accountants, were employed to make a valuation of the bankrupt's interest in the partnership estate and effects, and they were instructed in so doing to treat the partners as entitled to the profits made after the 30th of April, 1864, in equal shares. These instructions were alleged by *Staunton* to be the result of a compromise, the consideration for which was the abandonment by *John Hay* of all right to appeal from the decision of the Vice-Chancellor made in March, 1865, and it was alleged that conflicting opinions had been given by counsel as to the interests of the partners in the profits earned after the dissolution. In July, 1869, they made a report in accordance with their instructions, in which they stated that the value of the bankrupt's interest was £13,025, subject to four items not then ascertained, which were subsequently settled at £1008 7*s.* 6*d.*, and upon this report and certain affidavits made in support of it an order in the partnership suits was obtained in Chambers on the 15th of July, 1869, directing the payment of the sum last mentioned, and that Mr. *Staunton* should thereupon execute (as in fact he afterwards did) an assignment of the bankrupt's estate and interest to *John Hay* and *Briggs*. Among the affidavits was one made by Mr. *Chidley*, in which he stated at length the previous agreement of April, 1869, and expressed his belief that it would be for the benefit of all parties, "and particularly those interested in the estate of the bankrupt, that the sum of £13,025 should be accepted for the purchase of the share or interest in the partnership of the bankrupt and his assignee." In an affidavit made by Mr. *Good* at the same time there were similar statements, and upon these affidavits the order of the 15th of July, 1869, was procured upon the application of Mr. *Staunton*. The

£2000 deposit mentioned in the agreement was advanced for the purpose by *Maule*, and was received by the assignee, and the rest of the price, including the sum of £1008 7*s.* 6*d.* was also afterwards paid to the assignee out of moneys advanced by *Maule*. At a meeting of the bankrupt's creditors held shortly afterwards a dividend of 20*s.* in the pound was declared, and it was subsequently paid to the creditors.

On the 14th of July, 1869, the bankrupt wrote to *Staunton*, protesting against the contemplated sale to *J. Hay* and *Briggs*, and asking him to state frankly whether he intended to persevere in carrying out the contract for the sale of his interest in the distillery to persons whom the Vice-Chancellor strictly prohibited from buying it, or whether he meant to abandon it and proceed with the sale as directed by the Vice-Chancellor.

In answer to this letter, *Chidley*, on the 21st of July, wrote as follows:—

"Dear Sir,—Your letter of the 14th inst. to Mr. *Staunton* has been sent to me with instructions to inform you that the Court of Chancery has made an order directing the sale of your interest in the distillery to Messrs. *Hay & Briggs* for the sum of £13,025, and that such sale will be forthwith carried out in pursuance of such order.

"Yours truly,
"*J. R. Chidley.*"

In April, 1870, the bankrupt instituted a suit in Chancery to set aside the sale to *John Hay* and *Briggs*, but his bill was dismissed, on the ground that he, being uncertificated, was not competent to sustain such a suit: *Motion* v. *Moojen* (1). At a subsequent meeting of the creditors Mr. *Staunton* was removed from his office of assignee, and Messrs. *Davis* and *Wigginton* were, in August, 1872, appointed assignees of the bankrupt's estate.

In April, 1871, while the suit of *Motion* v. *Moojen* was pending, an agreement was entered into between *John Hay*, *Briggs*, and *Maule*, by which it was stipulated that *John Hay* should retire from the partnership and that *Maule* should purchase his interest at a valuation to be made by arbitrators; and it was one of the

(1) Law Rep. 14 Eq. 202.

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stipulations in that agreement that *John Hay* should prosecute his defence of the bankrupt's suit, but that *Maule* should take the risk of the result of that suit. The valuation of the arbitrators having been made in January, 1872, *John Hay* assigned all his interest in the partnership property and business to *Maule*, who at the same time also acquired all *Briggs's* interest, and thus became the sole owner of all the partnership effects, and thenceforth carried on the business for his own benefit. In the deed executed by *Briggs* on that occasion he covenanted that he would continue to defend, at the request and at the cost of *Maule*, the bankrupt's then pending suit, and conduct or cease such defence as *Maule* should wish or require.

The new assignees moved before the Chief Judge to the following effect:—That it might be declared that the sale of the bankrupt's share and interest in the partnership for £13,025, and the agreement of the 15th of April, 1869, were, on the part of *Staunton* and *John Hay* and *Briggs*, void, and that the bankrupt's estate was entitled to nine-twentieths of all the profits of the business of the partnership, from the commencement thereof down to the final winding-up of the same; that the partnership property and the debts owing to the concern might be sold by public auction as a going concern, as directed by the order of the 31st of July, 1868, and that *Maule* and all other necessary parties might be ordered to join in the sale, and that proper directions might be given as to the application of the money arising from the sale; that the affairs of the partnership might be wound up, and that the rights and interests therein of the bankrupt and his estate, and of *John Hay* and *Briggs*, might be ascertained; that *John Hay*, *Briggs*, and *Maule* might be restrained from dealing or intermeddling with the assets or affairs of the partnership, and that a receiver might be appointed; that, if necessary, it might be declared that the order of the 15th of July, 1869, was procured by fraud or misrepresentation on the part of *Staunton*, *John Hay*, and *Briggs*, and that the same was void and of no effect as against the bankrupt's assignees; and that *Staunton*, *John Hay*, *Briggs*, and *Maule*, or some of them, might be ordered to pay the costs of the motion.

The Chief Judge was of opinion that the sale of the bankrupt's

interest had been collusively and improperly made with the knowledge of the purchasers and of *Maule;* and that he had jurisdiction, under the 72nd section of the *Bankruptcy Act,* 1869, to treat it as void notwithstanding that it had been made by the order of the Court of Chancery. His Honour accordingly ordered the sales by *Staunton* to *John Hay* and *Briggs,* and also the sale by them of the bankrupt's interest to *Maule,* to be set aside, and the distillery, buildings, and plant to be sold by auction as a going concern, as directed by the order of the 31st of July, 1868, in the Chancery suits, with liberty to *Maule* to bid; and that the proceeds of the sale be applied, in the first place, to recoup what had been actually paid by *J. Hay, Briggs,* and *Maule* respectively, but without interest. He also gave directions for taking accounts of the partnership transactions down to the bankruptcy, and of the dealings of *J. Hay, Briggs,* and *Maule* with the partnership accounts since the bankruptcy; and he ordered the Respondents to pay the costs of the motion (1). From this order *Maule* appealed.

(1) 1873. July 28. WM 1873 175 as the motion now made relates to and involves questions both of law and fact arising in a case of bankruptcy coming within the cognisance of the Court, and which the Court does deem it expedient and necessary to decide for the purpose of doing complete justice and making a complete distribution of property, I am of opinion that by the express terms of the 72nd section of the *Bankruptcy Act,* 1869, this Court has full power to decide the questions raised, and, moreover, that by the general provisions of the statute, and by the rules and practice of the administration of the law in bankruptcy, the duty of deciding such questions is imperative on the Court. [His Lordship then stated the facts of the case as above mentioned, and continued:—] It has been insisted on behalf of the Respondents that this Court has no power to set aside the order lastly made by the Court of Chancery, and if there were

SIR JAMES BACON, C.J.:—

The substance of the complaint which is made in this case by the present assignees of the bankrupt is that his estate, which, if it had been duly administered, would have produced more than enough to have satisfied all his debts, and would have left for him a considerable surplus, has been so unlawfully dealt with by the late assignee, and by the other persons who are parties respondent on this motion, as that it has been transferred for less than its real value, and without regard to the rights of the creditors and the bankrupt. On the part of some of the Respondents it was objected, in the first place, that without reference to the facts this Court does not possess jurisdiction over the subject, and if this objection could have been sustained the time which the discussion has occupied would have been wholly misemployed. But inasmuch

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no means of giving such relief as the applicants may be entitled to but by setting aside that order, the objection might prevail, because I have no more the authority than I have the inclination to set aside that order. But if it shall appear that the order has been obtained by unjust and unlawful means, and if, under the colour of that order and under colour of the proceedings in bankruptcy, a wrong has been done, I am of opinion, not only that I have the power, but that it is my duty, to declare that, notwithstanding that order, the acts which have been done shall be treated as null and void, and to restore the rights which existed before that order was made. A judgment at law, the decision of any Court, domestic or foreign, may in all cases be examined into, and it would be opposed to every principle of justice if it were to be held that a judgment or order of a Court competent to make it should be so conclusive as that, by whatever means it had been obtained, its mere tenor should be operative and effectual, and preclude all investigation and inquiry. Although, therefore, I have no intention to dispute the formal validity of that order, or to impeach or interfere with the authority by which it was made, I feel myself bound to consider the circumstances under which it was made, the conduct of the parties by whom it was procured, the acts which have been done under its colour, and to prevent its being made the instrument of injustice, and a protection and indemnity to the persons by whom it was obtained, if it is shewn to have been improperly obtained and used.

[His Lordship then commented at some length on the evidence, in the course of which he expressed his opinion that *Staunton* had neglected his duty as assignee in various particulars, and that in a matter of so much importance as the sale he ought at least to have communicated with the creditors, or applied for the sanction of the Commissioner, for that he was prohibited by the Act of 1861, sect. 137, from selling the bankrupt's book debts and the goodwill of his business without the consent of the Commissioner. His Lordship then continued :—] I have read the whole of the printed and written evidence, and I have bestowed the best consideration in my power on the matters submitted to me. In the result I am satisfied that all that has been done by the several parties respondent on this application, subsequent to the appointment of Mr. *Staunton* as assignee, has been unlawful; that none of them have acquired any right or title which can be recognised by a Court of Equity to so much of the bankrupt's estate as formed the subject of the agreement of April, 1869, and was comprised in the subsequent assignment by *Staunton*. When that agreement was entered into Mr. *Staunton* was a mere trustee of the bankrupt's rights, without any interest, and with no other power than the Bankruptcy Statutes conferred on him; and *John Hay* and *Briggs* dealt with him, not only knowing all the circumstances to which I have adverted, but knowing also that he was such trustee, and that he could only lawfully act within the terms and limits of the decrees in the suits to which he and they were parties, and in accordance with his duties as assignee in the bankruptcy; and they all

On the 19th of November, 1872, *Maule* filed a bill against the assignees, in which he insisted on the fairness of the price which

he had paid for the bankrupt's share in the distillery, but submitted, for the purposes of the suit, to treat the sale as not

knew that the recital in the agreement of April, 1869, to the effect that *Staunton* had agreed, at the request of the majority of the creditors of *George Motion*, notwithstanding the order of July, 1868, to enter into the agreement, was wholly untrue. Upon that agreement all the subsequent dealings were founded, and in pursuance of that agreement I find that each of the Respondents has acted in violation of the equitable principles by which he was bound, and that they have all done so with a full knowledge of all the facts by which the impropriety and illegality of their respective dealings, so far as the bankrupt's estate is concerned, is established.

The report of Messrs. *Good & Daniel*, by which the amount of the purchase-money was ascertained, is shewn to have been made at the instance of *Moojen*, by whom and in whose handwriting the draft was revised and corrected. But the present assignees have shewn not only that that report could not have been adopted by an assignee who intended to discharge his duties to the creditors for whom he was a trustee, but that it is plainly inaccurate in several important particulars. [His Lordship mentioned several of these particulars.] By means of the charges and deductions contained in this report, which was part of the materials on which the order of July, 1869, was procured sanctioning the sale by *Staunton*, it was made to appear that the value of the bankrupt's interest amounted to £13,025; while the present assignees contend that, upon the taking the accounts in the manner directed by the decree, and by the due execution of the decree, that value amounted to, and would have produced £20,000 at the least.

The evidence before me does not enable me to ascertain the particulars of the partnership accounts, or to decide to what extent the objections taken by the assignees to the items in Messrs. *Good & Daniel's* report can be sustained. But sufficient is proved to satisfy me that the matter requires further investigation; and as, if the decrees had been properly carried into execution, the true result would have been ascertained, I think that it must now be declared that the sale and assignment which *Staunton* purported to make to *John Hay* and *Briggs* was void and must be set aside, and that the subsequent assignments by the latter to Mr. *Maule* are equally void and must also be set aside. It must also be ordered that the sale by auction of the partnership distillery, premises, plant, and effects, directed by the decree of the 31st of July, 1868, shall now be made; and that the debts owing to the partnership business shall be sold, as directed by that decree; and that the accounts of the partnership dealings and transactions be now taken, and that, in taking those accounts, credit be given to the bankrupt's estate for nine-twentieths of the profits made by the partnership concern.

I am quite aware that in proceeding to work out the rights of the parties by the means I have suggested many difficulties may arise, but those difficulties (all of which have been occasioned by what I consider the unlawful acts of the Respondents), whatever they may be, do not furnish any reason why justice should not be done; nor have I any reason to doubt that the

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binding on the Defendants; and he prayed that he might be declared entitled to a lien on the premises for the two sums of £13,025 and £1008 7*s.* 6*d.* and that the same might be paid to him by the Defendants with interest; and that the suit might be considered as supplemental to the partnership suits.

This suit was heard, by special leave of the Court, at the same time with the appeal.

Mr. *Swanston*, Q.C., and Mr. *Stirling*, for the Appellant:—

The sale of the bankrupt's interest having been made under a decree of the Court of Chancery in suits still pending, that Court is the proper Court to deal with the matter, and the Court of Bankruptcy has no jurisdiction.

Before the *Bankruptcy Act*, 1869, the Court of Bankruptcy had certainly no power to administer the assets of a partnership where only one of the partners was bankrupt: *Allen* v. *Kilbre* (1); *Fraser* v. *Kershaw* (2); *Ex parte Taitt* (3). And the 72nd section of the *Bankruptcy Act*, 1869, has not altered the rule. *Ellis* v. *Silber* (4) decides that although the jurisdiction of the Court of Bankruptcy has been enlarged by that Act, the jurisdiction of Chancery is not taken away; and in the present case the Court of Chancery had seisin of the case before the matter got into Bankruptcy.

With respect to the merits, no fraud has been proved against the

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power of this Court will be found sufficient to cope with the difficulties, and to arrive at a result which will be just to all parties.

The sum which has been paid and distributed among the creditors must be considered as a first charge upon the proceeds of the sale, and upon any balance which may appear to be due to the bankrupt's estate upon the taking the accounts. I have heard nothing from the Respondents as to the manner in which, or the shares in which, that sum ought to be distributed as between them; and for that reason I will reserve liberty to them to make any application they may be advised respecting it.

The only other order I can make at present is with regard to the costs, and as, in my judgment, this application and the order now made have arisen solely from the unlawful manner in which the Respondents have dealt with the bankrupt's estate, I must order the Respondents to pay the costs.

(1) 4 Madd. 464.

(2) 2 K. & J. 496, 501.

(3) 16 Ves. 193.

(4) Law Rep. 8 Ch. 83.

assignee or the bankrupt's partners. They were quite justified in carrying out the sale ordered by the Court of Chancery. As to the recital in the agreement of April, 1869, that the majority of the creditors concurred in the sale, it was an entirely immaterial recital, for it was not necessary that the creditors should be consulted at all, and the Judge could not have been misled by it. The assignees are estopped from disaffirming a contract which they have adopted. The debts have been paid to the creditors out of the purchase-money.

With respect to the suit, a purchaser may give up his rights as a purchaser and elect to be treated as a mortgagee, and he is entitled to interest on the money he has advanced: *Douglas* v. *Douglas* (1); *York Buildings Company* v. *Mackenzie* (2).

[As to the principle on which the valuation was made they referred to *Watney* v. *Wells* (3), *Crawshay* v. *Collins* (4), and *Barfield* v. *Loughborough* (5).]

Mr. *J. W. Chitty* and Mr. *Romer*, for the assignees:—

The whole history of the transaction shews a persevering attempt on the part of the solvent partners, aided by the former assignees, to get the property at a lower price than its real value. And in carrying out this scheme they deceived the Judge in Chambers by an erroneous recital that the majority of creditors had agreed to the contract for sale of the 15th of April, 1869. There had been no such consent, and if the Judge had been rightly informed he possibly would not have sanctioned the sale. Moreover, the value of the property was estimated by the valuers on an erroneous principle. Under such circumstances it was right for the Court of Bankruptcy to interfere. The Court has jurisdiction under the 72nd section of the *Bankruptcy Act*, 1869, to affect the rights of third parties if it is necessary to do so in order to do complete justice. It is a mistake to say that the Court was setting aside the jurisdiction of Chancery; it was, in fact, carrying the decree of the Court of Chancery into effect, and was only interfering, as it was its duty to do, to prevent the powers of the

(1) Law Rep. 12 Eq. 617.
(2) 8 Bro. P. C. 42.
(3) Law Rep. 2 Ch. 250.
(4) 2 Russ. 325.
(5) Law Rep. 8 Ch. 1.

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Court of Chancery from being abused: *Ex parte Anderson* (1); *White* v. *Simmons* (2); *Ex parte Morley* (3).

On the conclusion of the arguments of the counsel for the Respondents, Mr. *Swanston* was asked by the Court whether, in the event of the sale not being set aside, the Appellant would consent to a reference to inquire whether any and what further sum ought to be paid by him to make up the fair value of the bankrupt's interest in the property.

Mr. *Swanston* having replied in the affirmative, no reply was called for.

Dec. 16. LORD SELBORNE, L.C., delivered the judgment of the Court as follows:—

In order to prove that the agreement for the sale of the interest of the bankrupt *Motion* in the distillery concern to his co-partners *Briggs* and *Hay*, which was made on the 15th of April, 1869, and carried into effect under the order of the Court of Chancery of the 15th of July following, was the result of a fraudulent scheme on the part of the purchasers to obtain the bankrupt's share at an undervalue, the Respondents (the present assignees of *Motion*) have gone into an elaborate examination of the whole history of the partnership, the subsequent litigation in Chancery and the bankruptcy, from the formation of the partnership in August, 1863, downwards. In our opinion they have failed to prove any such fraudulent scheme. It is indeed sufficiently clear that *Motion* and his co-partners were greatly at variance with each other; that the co-partners were anxious to extricate themselves from their connection with *Motion* without sacrificing their own interests in the business; that they considered (a view in which *Motion* himself and his friends appear to have concurred) that an amicable settlement, in some other way than by working out adversely the decree of the Court of Chancery made on the 30th of April, 1864, would be more beneficial than the sale by auction directed by that decree;

(1) Law Rep. 5 Ch. 473. (2) Law Rep. 6 Ch. 555.
(3) Law Rep. 8 Ch. 1026.

and that after *Motion's* bankruptcy they were desirous of influencing, and did influence, (so far, at least, as they lawfully could), the choice of his assignees and of their solicitors. It is also clear that they desired, as the best way of arriving at a settlement and separating their interests from those of the bankrupt, to purchase the bankrupt's share from his assignee, and that with this object in view they made at different times several proposals, once at least offering a price which had been suggested to them by the bankrupt's own professional advisers (who were then also the solicitors of the assignee) as one which, if offered, would probably be accepted. One of them, Mr. *Hay*, objected in 1865 to an offer by a stranger (who was really an agent of the bankrupt himself) to buy the distillery, premises, plant, and goodwill, for a price which would have been considerably higher than that at which, four years afterwards, it was valued to themselves. They also entered from time to time, until shortly before April, 1869, into negotiations for a reference to arbitration, which proved fruitless. How far any of these offers and negotiations may have been frustrated by the objections or interference of the bankrupt, we do not stop to inquire; nor is it necessary for the present purpose to say that everything said and done during the whole course of these transactions by the solvent partners, or by their solicitor, Mr. *Moojen*, was right and commendable. It is sufficient, that in April, 1869, five years had elapsed from the date of the decree for the sale by auction of the partnership business as a going concern, and no progress towards a settlement had been made; nobody had taken any effective step with a view to enforce the decree, or Vice-Chancellor *Giffard's* subsequent order of July, 1868, which (with some unimportant variations) directed its prosecution; and the solvent partners were perfectly entitled to come to any honest and fair arrangement with the assignee of the bankrupt's estate for the purchase of his interest, if they were able so to do. Nothing which had taken place before April, 1869, seems to us to require or warrant the inference of a fraudulent purpose.

What, then, are the objections to the agreement of the 15th of April, 1869? *Primâ facie* it is honest and fair; it provides for the sale by *Staunton*, the assignee, of the bankrupt's share of the partnership assets at such a price ("in the event of the amount of

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purchase-money not being agreed upon by mutual consent") as the Chief Clerk in the Chancery suit should ascertain and fix as its value after taking the partnership accounts.

The first objection is, that Mr. *Staunton* and Mr. *Chidley*, his solicitor, had been nominated by a majority of creditors' votes, which the solvent partners and their solicitor, Mr. *Moojen*, had been able to command or influence under the bankruptcy, and that, under these circumstances, Mr. *Staunton* ought to be regarded as a passive instrument in the hands of the purchasers or of Mr. *Moojen*, and not as a real vendor by a *bonâ fide* contract of sale.

This is a charge against the assignee and his solicitor much too grave to be lightly entertained. It by no means follows because the assignee or his solicitor may have been nominated through a particular influence that they would not, when appointed, endeavour to do their duty. They have both positively sworn that they did so; the agreement, on the face of it, furnishes no proof or presumption to the contrary; and, upon the whole evidence before us, we do not doubt that they acted in making it with an honest purpose.

It is next said that the agreement was made secretly, without consulting the bankrupt, or his solicitors, Messrs. *Linklater*, and before a correspondence as to a proposed arbitration had been brought to a close. But on the 19th of March Messrs. *Walters & Moojen* wrote to Messrs. *Linklater* that "the parties were then in negotiation in reference to a settlement;" and before the 30th of April *Motion* himself knew, and had informed Messrs. *Linklater*, that an agreement had been prepared "providing for a reference and a sale of his interest to the other partners;" and a copy of the agreement itself was very soon afterwards in Messrs. *Linklater's* hands. Notwithstanding this, no application was made to the Court of Bankruptcy on the subject, either by the bankrupt or by any creditors friendly to him, (and there were such creditors), till after the Order of the Court of Chancery of the 15th of July, 1869; soon after which an *ex parte* complaint was made by the bankrupt himself only to Mr. Commissioner *Holroyd*, who was not satisfied that there was any sufficient reason to interfere. The explanation offered is, that Mr. *Moojen*, Mr. *Maule*, and Mr. *Chidley* had led Messrs. *Linklater* to believe that

nothing would be done without previous communication with them. But this statement (of Mr. *Addison*) is contradicted by Mr. *Chidley* and Mr. *Maule;* and although Mr. *Moojen* is not a witness, it seems to us far more likely that there may have been some misconception as to this point on Mr. *Addison's* part, than that the assignee and the purchaser should have fettered themselves by such a promise, which they were certainly under no obligation either legal or moral to give, and which (considering the history of the preceding five years) might probably have tended to create fresh difficulties and delays in the way of the settlement at which they had practically arrived, however fair it might be.

The next objection, and the one which seems to have had most influence with the Chief Judge in Bankruptcy, is, that it was in itself a breach of trust on the assignee's part, and absolutely inconsistent with his duty, to sell the bankrupt's share otherwise than by public auction, in the manner directed by the decree of 1864, and the order of Vice-Chancellor *Giffard* of July, 1868. This view appears to be in great measure, if not altogether, founded on the 137th section of the *Bankruptcy Act*, 1861, which makes it necessary that an assignee should have the sanction of the Court of Bankruptcy (which in this case was not asked or obtained) to justify him in selling by private contract "all or any of the book debts due or growing due to the bankrupt, and the books relating thereto, and the goodwill of his trade or business." We think that this section relates to the sale of book debts, books, and goodwill belonging to the bankrupt only, and which, as such, form part of his distributable assets. The book debts, books, and goodwill of a dissolved partnership, of which only one partner is bankrupt and the others continue solvent, are not assets distributable or saleable in the bankruptcy, and a sale of the bankrupt's share in the property and assets of such a partnership is not, in our opinion, a sale of book debts, books, or goodwill within the meaning of that enactment. It follows, in our judgment, that there is nothing in the statute which makes it contrary to the duty of an assignee to sell by private contract (if he thinks it is for the benefit of the estate) such a share in such a partnership, especially to the other partners, who generally have the greatest inducement to offer for it if so sold, and not otherwise, the most advantageous terms.

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Nor does it appear to us to make any difference, that there was in this case a pending litigation, and existing Orders of the Court of Chancery, made while the parties were unable to agree, for a sale of the whole business as a going concern by public auction. If in such a case the Court of Chancery itself was satisfied to act upon the agreement of the parties to the suit, and to authorize a sale by private contract, we cannot see why an order of that Court should be a difficulty in bankruptcy, which, in the Court which made it, was none.

In connection with this point, it seems right also to advert to the recital in the agreement of the 15th of April (which is not proved) that it was made by Mr. *Staunton* at the request of the majority of the creditors of *Motion*. It was not necessary by law that there should be any consent of creditors; and in the affidavits on which the Order of the 15th of July was made it is not represented that there was in fact any such consent. We cannot hold the agreement to be vitiated by this unnecessary recital, whatever may have been the reason for its introduction. The parties to the agreement themselves cannot have been misled by it; nor are we able to suppose that the Judge in Chambers placed reliance on such a bare recital, unsupported by evidence, as a reason for giving effect to the contract of all the parties to a litigation in which no person under disability was concerned.

But it is further said, that the price actually paid was fixed by *Good & Daniel*, the valuers, who were introduced in May, 1869, with a view to the settlement of the price by agreement, considerably below the proper amount; and that this was wholly or in part due to the want of proper attention on the part of the assignee, and to erroneous instructions which the valuers received affecting the principle of their calculations, particularly as to the division of the profits made by the distillery after the dissolution of the partnership. As to this, while we are satisfied that no case of fraud is made out, we are by no means satisfied that there was not material error. The profits after the dissolution do not appear to us to have been divided by the valuers upon a principle consistent either with the proportions of profits and loss fixed by the partnership articles or (if these ought not to have furnished the rule) with the relative amounts of the capital belonging to the bankrupt and

the other partners in the concern. Nor can we say that this part of the valuation stands upon the footing of a fair compromise of a disputed question, seeing that the opinion of one eminent counsel, said to have advised in a contrary sense to another, is not produced; that the communications with the valuers (though employed on the part of the assignee only) were left more than they ought to have been (if any compromise was intended) to Mr. *Moojen;* and that it does not at all clearly appear by the evidence when or how the supposed compromise was made, or who told Mr. *Good* (as he says he was told) that it had been arranged "that *George Motion,* or his estate, was to receive nine-twentieths of the profits up to the dissolution, and one-third since, certain points of contention being given up by Mr. *John Hay.*" The only point of contention which Mr. *John Hay* had to give up had been decided against him in the Chancery suit by Vice-Chancellor *Wood;* and though he might still have been at liberty to appeal from that decision, and though we do not even now hold the Appellant bound by it (considering the present position of that suit, in which no certificate ever has been or ever will be made), the arguments addressed to us have not as yet produced upon our minds the impression that this contention was sufficiently substantial to be the basis of a fair and reasonable compromise. The manner, also, in which the items which were reserved for further consideration by Messrs. *Good & Daniel's* report were afterwards dealt with, and the further sum of £1008 7*s.* 6*d.* payable to the bankrupt's estate was ascertained, is (to say the least) much too imperfectly explained to be at all satisfactory to our minds.

We are relieved, however, from any difficulty which we might otherwise have felt in dealing with this part of the case, by the submission of the Respondent to pay, in addition to the two sums of £13,025 3*s.* 1*d.* and £1008 7*s.* 6*d.* already paid, such further sum (if any) as, on prosecuting the inquiry which we now propose to direct, may appear to be requisite in order to make up the full and fair value of the bankrupt's interest in the concern. We do not think that we ought to set aside the whole sale on account of any mere error (not amounting, in our judgment, to fraud) in working out the mode of calculating that value which the parties, subsequently to the agreement of the 15th of April, 1869, agreed to

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adopt. But we think it will be proper, while discharging the order of the Chief Judge, to direct an inquiry by one of the Registrars of the Court of Bankruptcy whether any and (if any) what further sum ought to be paid by the Appellant to make up the just and proper value of the bankrupt's interest upon the footing of the partnership accounts referred to in the agreement of the 15th of April, 1869; in making which inquiry the Registrar is to proceed in the first instance upon the report and valuation made by Messrs. *Good & Daniel* and agreed to between the parties, so far as the same extends, but with liberty to either party to surcharge and falsify the same. Further consideration must necessarily be reserved, and such further consideration may be taken before the Court of Appeal.

We think it our duty to add, that, if we had agreed with the Court below as to the merits of this case, we should have been unable to concur in the propriety of the order made, which seems to have proceeded upon the view, that, if the sale of the bankrupt's share of the partnership assets to his partners were set aside, it would then be competent and proper for the Court of Bankruptcy, under the 72nd section of the Bankrupt Act of 1869, to work out in Bankruptcy the decree and order made in the Chancery suit for the sale of the whole distillery, including the original shares and interests of the two solvent partners (now sold by them to Mr. *Maule*) as a going concern, and for taking all the partnership accounts. With this interpretation of the powers given to the Court of Bankruptcy by the 72nd section of the Act of 1869 we cannot agree. That section gives the Court a very large authority to "decide such questions" as it may be found necessary or convenient to determine, for the proper purposes of the administration in Bankruptcy. But it does not, as we understand it, at all enable the Court of Bankruptcy to draw compulsorily within the sphere of its jurisdiction property or the owners of property not vested in the assignee, and not originally subject to the administration in bankruptcy. Still less does it authorize that Court, when a decree for sale and accounts has been made in a Chancery suit against solvent partners of a bankrupt, to treat such a decree as giving rights to be worked out in Bankruptcy and not in Chancery. If, indeed, the Court of Bankruptcy finds property of the bankrupt

(whether a share in partnership assets or of any other kind) in the hands of a purchaser with notice of fraud, to whom it has come by a fraudulent conveyance from an assignee in bankruptcy, it may well hold that it has power to order such purchaser to reconvey and revest in a substituted assignee the property so fraudulently acquired; and we are very far from saying that the fact of such a conveyance having been made (virtually by consent) under an order of the Court of Chancery, in a suit between the parties, would be any serious obstacle to the exercise of that jurisdiction. But if this were done in a case like the present, in which the purchaser has actually paid the agreed amount of his purchase-money to the assignee, and such purchase-money has been actually distributed by paying dividends, in this case 20*s.* in the pound, to the bankrupt's creditors, we think relief could only be given upon the usual equitable terms on which redress in similar cases is afforded by the Court of Chancery. If such a sale is set aside in either forum at the instance of assignees proceeding, as they must necessarily do, for the interest only of the creditors who have received those dividends, or of the bankrupt in respect of a surplus which (if it exists) arises through the payment of his debts by those dividends, they are, in our judgment, as much bound as any other plaintiffs in any other forum to repay the whole purchase-money *bonâ fide* and actually paid, and also, unless there is a waiver of accounts on both sides, to repay it with interest, the purchasers accounting for any profits which they may have received.

It remains to dispose of the Chancery suit instituted by Mr. *Maule* against the assignees, in which he claims to be treated, not as a purchaser, but as a mortgagee entitled to foreclosure or redemption. We think that, whether he could or could not maintain his title as purchaser against the equity alleged by the assignees, it was certainly impossible for him to maintain that suit. If his title was voidable, it was so, not at his own option, but at the option of the assignees in bankruptcy; and the terms on which, if at all, relief ought to be given to those assignees, were proper to be decided by the Court which might give that relief. This bill, therefore, must be dismissed with costs, but Mr. *Maule* must receive the costs of the proceedings in Bankruptcy so far as they have been occasioned or augmented by the attempt to set aside the agreement

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of the 15th of April, 1869, for fraud, and the costs payable by him will be set off against those which he is to receive; as to the rest of the costs of the proceedings in Bankruptcy, we think they ought to be reserved until the result of the inquiry which we direct is known, and be disposed of on further consideration after that inquiry.

Solicitors: Messrs. *Linklater, Hackwood & Co.;* Messrs. *H. F. & E. Chester;* Mr. *J. R. Chidley.*

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[1871 L. 145.]

Mandatory Injunction—Damages—Light and Air—Rule as to Forty-five Degrees.

It is not to be laid down as a general rule that, where a building injuriously affecting ancient lights has been completed before the bill is filed, the Court is unable to give damages unless the injury is such as would justify a mandatory injunction.

Durell v. *Pritchard* (1) explained.

Per the *Lord Chancellor*:—The fact that the height of a building above an ancient light is not greater than its distance is not conclusive evidence that the light is not injuriously affected, but is *primâ facie* evidence of there being no such interference with the light as the Court will restrain, and requires to be rebutted by special evidence of injury.

Observations as to evidence relating to obstruction of air as well as light.

THIS was an appeal by the Plaintiffs from a decree of Vice-Chancellor *Wickens* dismissing their bill with costs.

The Plaintiffs were the owners of a public-house called the *Old Swan*, in *Swan Lane, Upper Thames Street*, in the city of *London*, abutting west on *Swan Lane*, south on a space called *Old Swan Wharf*, and east on a passage leading out of *Old Swan Wharf*. The Defendants were owners of premises bounded by the western side of *Swan Lane* and *Old Swan Wharf*, and extending considerably further south than *Old Swan Wharf*, the eastern boundary of these premises being a nearly straight line running directly south. The southerly part of the Defendants' property consisted

(1) Law Rep. 1 Ch. 244.

in part of an open passage running westwardly, and in part of a low warehouse lying in a south-westerly direction from the southern front of the *Old Swan Inn*. In 1871 the Defendants pulled down the warehouse, and commenced building on the site, and over the above-mentioned passage, a block of buildings about fifty feet high. On the 9th of October, 1871, the Plaintiffs gave the Defendants notice that they claimed free access of air and light to the windows on the southern and western sides of the inn, and required the Defendants to desist from building to such a height as to interfere with them, and that in default of their compliance with this notice an injunction would be applied for. The Defendants' solicitors sent a reply that they would accept service; and on the 12th of October, 1871, the bill was filed, praying for an injunction to restrain the Defendants from erecting or completing, or allowing to remain on their land, any building interfering with the access of light to the Plaintiffs' ancient windows, and, in the alternative, for damages.

At this time the building was in part about thirty-seven feet high, and in other part forty-eight feet high. An application for an injunction was made to Vice-Chancellor *Wickens* on the 17th of October, and ultimately, after abortive negotiations as to a reference by consent to assess damages, the motion was ordered to stand over to the hearing. The question ultimately turned solely on the obstruction of light coming to ancient windows on the southern side. On the 16th of July, 1873, the cause was heard on motion for decree before Vice-Chancellor *Wickens*, who dismissed the bill with costs, being of opinion that no injury to the Plaintiffs was proved. The Plaintiffs appealed.

Mr. *Greene*, Q.C., and Mr. *C. Walker*, for the Appellants, referred to *Yates* v. *Jack* (1), *Staight* v. *Burn* (2), and *Heath* v. *Bucknall* (3).

Mr. *Dickinson*, Q.C., and Mr. *W. Pearson*, for the Defendants:—

The only right the Plaintiffs could have when they filed their bill was a right to a mandatory injunction. They have shewn no

(1) Law Rep. 1 Ch. 295. (2) Law Rep. 5 Ch. 163.
(3) Law Rep. 8 Eq. 1.

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case for that, and they therefore cannot have damages: *Durell* v. *Pritchard* (1).

[The LORD CHANCELLOR referred to *Holmes* v. *Upton* (2).]

(1) Law Rep. 1 Ch. 244.

(2) HOLMES *v.* UPTON.

THE substance of the bill filed on the 23rd of March, 1837, was as follows: It stated an Act of 4 Will. 4 constituting trustees of the *Wazley*, *Armley*, and *Bramley* district of road, in the county of *York*, and empowering them to make certain roads with all arches, culverts, drains, &c., requisite for the accommodation of the owners of the adjoining lands, and to take for that purpose any lands mentioned in the book of reference therein mentioned, upon making compensation to the owners. By this Act it was provided that if in making the roads any embankment should be made in the lands of *Ann Holmes*, it should not be more than thirteen feet high, and that the trustees should make convenient communications across it, and that no deviation should be made in the lands of *Ann Holmes* more to the north than the line drawn in the map therein mentioned, without her consent in writing. That at a meeting of the trustees, the Defendants, the *Uptons*, were appointed clerks to the trustees, and a committee was formed for making a branch road authorized by the Act. That the line of this road was staked out in conformity with the line on the parliamentary plan. That on the 1st of November, 1834, a notice to treat for the land required for this purpose was given to the solicitor of *Ann Holmes*, who accepted service, subject to a specification of the works to be done being furnished. That no proper specification was furnished, and after some fruitless negotiations, the trustees in January, 1835, made a final offer of £149 for purchase-money, and £100 for damage by severance and otherwise. That this offer was declined, and thereupon a jury was summoned to ascertain the compensation. That on the 13th of February, 1835, the jury assessed the compensation at £329, which was afterwards paid. That the land so paid for was the land staked out for the branch road, and no part of it lay north of the parliamentary line. That the magistrates of the borough of *Leeds*, at a special sessions on the 30th of August, 1836, and again on the 12th of September, 1836, refused to certify that the road was completely opened and fit for public use. That in October, 1836, *Ann Holmes* died, having devised her estate to the Plaintiff. That in pursuance of an order of the trustees made on the 18th of November, 1836, one *W. Hardcastle* (the contractor employed by the trustees) proceeded to erect five buttresses upon the Plaintiff's land, against the wall confining the embankment upon which the road was carried through the Plaintiff's land, and that each of the buttresses extended more than five yards on the north side of the parliamentary line. That the Plaintiff, as soon as she was aware of the intention of the trustees to encroach on the north of the line, served notices on them to desist. That, notwithstanding the notices, the work went on, and the Plaintiff accordingly commenced an action of trespass against *Hardcastle* and one of the trustees who had actively interfered in directing the encroachment. That on the 28th of December, 1836, the trustees offered £25 as compensation, which was refused. That the Defendants in the action pleaded, and paid £25 into Court,

It is not sufficient for the Plaintiffs to shew that some light has been obstructed: they must shew that the house is made substantially less fit for occupation: *Back* v. *Stacey* (1); *Kelk* v.

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after which they went on and completed the five buttresses, and threatened and intended to erect a sixth also on the north side of the parliamentary line. That the Plaintiff, on the 13th of February, 1837, served the trustees with a notice, desiring them to remove the encroachments within twelve days, and informing them that if they did not, actions would from time to time be brought against them for continuing the encroachment. The bill went on to allege that the buttresses were made necessary solely by the faulty construction of the wall. The bill further alleged that in constructing the road over the Plaintiff's land no sufficient culverts or drains had been made so as to allow the water on the Plaintiff's land to flow in its accustomed courses, and that such water, being interrupted in its courses by the embankment, was thrown back and made to flow over the Plaintiff's land, and that the road had been so constructed as to throw the water and sand which was washed from the surface of the road and embankment upon the Plaintiff's land, whereas they were required by the Act to make all culverts, ditches, and drains necessary for the Plaintiff's convenience. The bill referred to an Act under which the trustees might be sued in the names of their clerks, and it prayed an injunction to restrain the trustees from encroaching upon the Plaintiff's land to the north of the road by making or building any further buttresses or other works thereupon, or in any other manner, and that they might be in like manner injoined from continuing the encroachment already made on the land, and that they might, if necessary, be compelled by the decree of the Court to remove the works already erected by them in violation of the Act, and to withdraw from the Plaintiff's land, after reinstating the same in its former plight and condition; and that they might be restrained by the like injunction from continuing the road in such a state and condition as to cause the surface water therefrom to flow upon or over the Plaintiff's lands, or to cause the water upon the Plaintiff's lands to be interrupted in its accustomed courses, and to be thrown back upon the Plaintiff's lands; and for further relief.

The Defendants, by their answer, insisted on the right of the trustees to erect the buttresses, and asserted that they had made sufficient drains and culverts for allowing the water on the Plaintiff's land to flow in its accustomed courses, and for carrying off the surface water from the road and embankment.

Nov. 19, 1840. Lord *Cottenham* made a decree granting a perpetual injunction to restrain the trustees of the road, their workmen, &c., "from encroaching upon the lands of the Plaintiff to the north of the road so constructed as in the bill mentioned, by making or building any buttresses or other works thereon, or in any other manner, and from continuing the said road in such a state and condition so as to cause the surface water therefrom to flow upon or over the Plaintiff's lands, or to cause the water upon the Plaintiff's lands to be thrown back upon the Plaintiff's said lands." Reg. Lib. A. 1840, f. 169.

(1) 2 Car. & P. 465.

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Pearson (1). This they fail to do. Where the angular height of the erection is not more than forty-five degrees, the Court will not interfere: *Beadel* v. *Perry* (2). The obstruction here is lateral, which is less important than an obstruction in front: *Clarke* v. *Clark* (3). The Plaintiffs' evidence, which only says there is a "material diminution of light," is too vague: *Robson* v. *Whittingham* (4).

Mr. *Walker*, in reply, referred to *Dent* v. *Auction Mart Company* (5).

SIR W. M. JAMES, L.J.:—

This appeal from the Vice-Chancellor is an appeal upon a mere question of fact, in which the burthen of proof lies upon the Plaintiffs. In all these cases as to light and air the Court of Equity is not administering any equitable relief strictly so called, but is giving an equitable remedy for the violation of a legal right, and the question before a Court of Equity in all these cases is substantially the same question as that which would have to be determined by a jury under proper directions by a Judge as to the principles of law applicable to the case. Here we have to charge ourselves, performing the functions of both Judge and jury, in the same manner as if we were charging a special jury. In the case of *Kelk* v. *Pearson* the Lord Justice and myself endeavoured to express what we thought to be the rule applicable to these cases, and I believe the Lord Chancellor entirely agrees with the mode in which it is there expressed. We only repeated in different words what is to be found in many previous cases, that the extent of the right of an owner of ancient lights is to prevent his neighbour from building so as to obstruct the access of sufficient light and air to such an extent as to render the house substantially less comfortable and enjoyable—that is to say, that he is "entitled to sufficient light, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, if it were a dwelling-house, or for the beneficial use and

(1) Law Rep. 6 Ch. 809.
(2) Ibid. 3 Eq. 465.
(3) Law Rep. 1 Ch. 16.
(4) Ibid. 442.
(5) Law Rep. 2 Eq. 238, 254.

occupation of the house, if it were a warehouse, a shop, or other place of business."

Now in this case there is no pretence for saying that there has been any interference with the comfortable enjoyment of the house as a dwelling-house. The question is confined entirely to the diminution of light in one room, which room has for many years been used as a bar to a public-house, and will in all probability, so long as the law as to public-houses remains unaltered, continue to be used in that way.

The question then is, Has there been any substantial diminution of the light so as to cause inconvenience in the use of the room as a bar to the public-house? The Vice-Chancellor was of opinion that the Plaintiffs, upon whom the burthen was cast of making the case out, had utterly failed to discharge themselves of that burthen, and dismissed the bill with costs. Upon a matter of evidence I should be slow to differ from a conclusion arrived at by a Vice-Chancellor unless I was satisfied that he had gone wrong with regard to the weight of the evidence, or the burthen of proof, or had otherwise proceeded on a wrong principle. But here I feel quite satisfied that if I had heard the case in the first instance, I should have arrived at the same conclusion. The evidence on the part of the Plaintiffs is simply scientific evidence, which is rebutted by scientific evidence entitled to at least as much weight, and when the scientific evidence of the Plaintiffs' witnesses is challenged by the scientific evidence on the part of the Defendants, the Plaintiffs' witnesses in reply fail to repeat or reassert their first statements in opposition to the evidence given against them. Therefore the balance of the scientific evidence, in my opinion, is entirely in favour of the Defendants. We are then asked to put ourselves in the position of experts, and to say upon the evidence of models and the plans that there must be that diminution of light which is sufficient to create a nuisance. I am unable to arrive at any such conclusion. If I were to judge by the models and plans, I should be very loth to come to the conclusion that there was any such diminution of light, and certainly I should not think of putting my conclusion against the positive evidence of the scientific witnesses who have given evidence for the Defendants. It is not unworthy of observation, also, that every one of the scientific witnesses who is called upon to give

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evidence in favour of the Plaintiffs has positively stated that which, to my mind, is utterly without foundation, namely, that there has been not only a diminution of light, but a diminution of the access of air. I regret that the witnesses should have sworn in that way; and it has left an impression on my mind that they have been swearing according to the language of decisions, "diminution of light and air" being the language used in bills and cases. They have put those words into their affidavits without ever stopping to consider accurately what it was they were saying.

Then that being the state of the evidence from the scientific witnesses on both sides, what is the other evidence? [His Lordship here reviewed the other evidence.] Upon this evidence it seems to me to have been utterly impossible for the Vice-Chancellor to come to any other conclusion than that to which he did come, that the Plaintiffs had entirely failed to make out any substantial damage whatever to themselves in their character of owners of the property, and that their bill ought to be dismissed with costs.

With regard to one point which was raised by Mr. *Pearson* in his very able argument, based upon *Durell* v. *Pritchard* (1), but upon which the Vice-Chancellor does not appear to have proceeded, that unless there was a clear case for a mandatory injunction as to the whole of the building, there was no case for the Court's interference, I think it is not safe to rely upon *Durell* v. *Pritchard* as establishing any such doctrine. I think this Court would not be slow to give relief in damages where, although no sufficient case for a mandatory injunction was made, it found that a case for substantial damages might be laid before a jury; and so the Court might, by interfering under the powers of *Lord Cairns' Act*, prevent multiplicity of actions.

LORD SELBORNE, L.C.:—

I entirely agree with the judgment which the Lord Justice *James* has delivered, and I do not propose to add anything to what he has said as to this particular case; but it may be right that I should refer to one or two points raised in the argument which touch upon principle. First of all, I wish to express my complete adherence to the view of the law taken in the case of *Kelk* v.

(1) Law Rep. 1 Ch. 244.

Pearson (1), correcting some impressions which might have arisen from the language used in former cases by some learned Judges. In that case it was laid down that the Act of Parliament, under which twenty years' enjoyment gives a title to light, has not altered the nature of the right, or the principle on which it is to be determined whether the right has been infringed, but that it has merely substituted a statutory title for the fiction of a presumed grant. With that doctrine I entirely agree.

In regard to *Durell* v. *Pritchard* (2), it is to be observed that the language of Judges should always be construed with reference to the circumstances of the cases before them, and the duty they have to discharge in those cases; and I am not prepared to assent to the opinion, if such an opinion exists, that in every case in which a building has been completed, even entirely completed, before the filing of a bill, this Court is powerless. The Court has power, if it thinks fit, to grant a mandatory injunction—that is, an order directing the removal of the building. We know, of course, that the Court is not in the habit of doing so, except under special circumstances, but those special circumstances may exist; and however sound the proposition may be that a decree for damages can be made only where the power of granting an injunction exists, I am not prepared to lay it down as a general proposition that, because the building complained of has been completed before the bill has been filed, damages cannot be recovered. It is manifest that a decree for damages would prevent multiplicity of actions. If no decree could be made, the Plaintiff would be left to his remedy at law; and if the nuisance were not abated, he might go on bringing a succession of actions. That this Court might interfere, after such a succession of actions had been brought, and then grant a specific remedy by way of injunction, was decided by Lord *Cottenham*, in a case which I well remember, though it is not reported, of *Holmes* v. *Upton*. The circumstance, therefore, that a work, which is a continuing trespass, has been completed, cannot of itself take away the jurisdiction of this Court to interfere, in a case otherwise proper, even by injunction.

The only other points that I think it worth while to notice are these. They no doubt relate more to evidence than to law, but

(1) Law Rep. 6 Ch. 809. (2) Law Rep. 1 Ch. 244.

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still they have a bearing on principle. The whole nuisance suggested here is alleged to arise from the lateral and oblique obstruction caused by buildings on the west, it being admitted that the light from the south and east is not interfered with. I quite agree with Lord *Cranworth*, in the case of *Clarke* v. *Clark* (1), that a greater amount of evidence is needed to prove a material injury to light by lateral or oblique obstruction than is necessary in a case of direct obstruction, and that more especially when the buildings to the side are not erected upon what was previously an open space, but upon a space already, to a very great extent, obstructed by buildings—though these buildings were, indeed, of less height and had a passage through part of them, which passage, however, did not afford light directly to the Plaintiff's windows. Further, with regard to the forty-five degrees, there is no positive rule of law upon that subject; the circumstance that forty-five degrees are left unobstructed being merely an element in the question of fact, whether the access of light is unduly interfered with; but undoubtedly there is ground for saying that if the Legislature, when making general regulations as to buildings, considered that when new buildings are erected the light sufficient for the comfortable occupation of them will, as a general rule, be obtained if the buildings to be erected opposite to them have not a greater angular elevation than forty-five degrees, the fact that forty-five degrees of sky are left unobstructed may, under ordinary circumstances, be considered *primâ facie* evidence that there is not likely to be material injury; and of course that evidence applies more strongly where only a lateral light is partially affected and all the lights are not obstructed. I make that observation, not imagining that either at law or in this Court any Judge has ever meant to lay down as a general proposition that there can be no material injury to light if forty-five degrees of sky are left open; but I am of opinion that if forty-five degrees are left, this is some *primâ facie* evidence of the light not being obstructed to such an extent as to call for the interference of the Court—evidence which requires to be rebutted by direct evidence of injury, and not by the mere exhibition of models.

The only other point which I propose to notice relates to the evidence about air. I observe that a formula has crept into the

(1) Law Rep. 1 Ch. 16.

pleadings in cases of this description, and, as the Lord Justice has said, has passed from the pleadings into the evidence, in which air is coupled with light. Now, the nature of the case which would have to be made for an injunction by reason of the obstruction of air is *toto cœlo* different from the case which has to be made for an injunction in respect of light. It is only in very rare and special cases, involving danger to health, or at least something very nearly approaching it, that the Court would be justified in interfering on the ground of diminution of air. Therefore, when witnesses say that there is a material diminution of light and air, and say no more, they are in truth reducing the value of their evidence as to light to the standard which must be applied to their evidence as to air, as to which such evidence is of no value whatever.

SIR G. MELLISH, L.J.:—

I am entirely of the same opinion.

Solicitors: Mr. *Mark Shephard*; Messrs. *Western & Sons.*

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[1873 G. 62.]

Injunction—Mandatory Injunction—Trespass—Highway—Water-pipes—Action at Law—Value—Motives.

Where water-pipes had, without the consent of the owner of the soil, been laid in the soil of a highway, an injunction to restrain the continuance of the pipes was granted; the owner of the soil not being left to his remedy at law, and not being required to establish his right at law.

The facts that the soil under the highway was of no value to the owner, and that his motive for applying to the Court was not connected with the enjoyment of his land, were held not to be reasons against the granting of the injunction.

Decree of *Jessel*, M.R. affirmed.

Deere v. *Guest* (1) commented on.

S. *GOODSON*, the Plaintiff in this case, was owner in fee of an undivided moiety of lands in the *Isle of Thanet*, abutting upon the

(1) 1 My. & Cr. 516.

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highway from *Broadstairs* to *Ramsgate*, and as such was owner in fee of an undivided moiety of the adjoining half of the highway. He was also shareholder in a waterworks company at *Ramsgate*. The Defendant, *R. Richardson*, owned some houses at *Ramsgate*, and, being dissatisfied with the waterworks company, proceeded to construct waterworks for the supply of his houses. He applied to the Highway Board of the *Isle of Thanet* for permission to lay down pipes along the highway, which, after some time and discussion and opposition from the waterworks company, was, on the 8th of April, 1873, granted to him; the clerk to the board at the same time informing him that the board could only give permission subject to the rights of the owners of the lands. The Defendant had on the 4th of April begun to lay the pipes along the highway, and (apparently in the course of the day of the 9th of April) he laid the pipes in the soil of the side of the road adjoining the land of which the Plaintiff had an undivided moiety. On the same 9th of April the Plaintiff and other landowners served the Defendant with notice not to lay pipes in their lands, and that they intended to apply for an injunction. There was a dispute as to the exact times when the pipes were laid, and when the notice was received.

On the 21st of April the bill in this suit was filed, praying for a perpetual injunction to restrain the Defendant from so laying any pipes and from allowing them to remain. The Master of the Rolls, Sir *G. Jessel*, made a decree for a perpetual injunction, and the Defendant appealed.

Mr. *Jackson*, Q.C., and Mr. *J. Beaumont*, for the Appellant:—

We contend, in the first place, that the Plaintiff is too late. In the next place, the Plaintiff's remedy, if any, is at law: *Deere* v. *Guest* (1). No doubt the land is legally his, but he has in reality suffered no injury, and the Court will not interfere, or at all events will only give damages: *Bowes* v. *Law* (2), especially where the work is all done: *Hindley* v. *Emery* (3). The object of the Plaintiff is not to protect his land, but to prevent the Defendant from making waterworks to the probable injury of the Plaintiff's waterworks.

(1) 1 My. & Cr. 516. (2) Law Rep. 9 Eq. 636.
(3) Law Rep. 1 Eq. 52.

Mr. *Southgate*, Q.C., and Mr. *Davey*, for the Plaintiff, were not called upon.

LORD SELBORNE, L.C.:—

In this case the Master of the Rolls has thought it right, in the exercise of that discretion which, as Mr. *Beaumont* very properly said, is a judicial and not an arbitrary discretion, to grant an injunction restraining the continuance of certain water-pipes which the Defendant has placed in the Plaintiff's land.

Now, it is undoubtedly true that where a legal remedy exists, this Court, in determining whether it will leave the parties to that legal remedy or will interfere by way of injunction, has regard to the circumstances of each particular case, and amongst those circumstances are, no doubt, the time at which the work was executed, and also what will be the result to the parties of the interference of the Court, on the one hand, or of leaving them to their legal rights and liabilities, on the other hand. But I apprehend that the Court has nowhere said that when a trespass of this kind has been committed under circumstances at all similar to those in the present case, the mere fact of the trespass being complete at the time when the bill was filed will prevent an injunction against the continuance of the trespass.

The Plaintiff is the owner of the soil through which these pipes have been laid, and no one has a right to take that soil for such a purpose, except under contract with the owner, or with his consent. At the same time the Plaintiff has not the right of an unlimited owner in respect of that soil, because the upper surface is dedicated to the public for the purpose of a public highway, which is under the management of local authorities; and the Plaintiff cannot use the soil, or deal with it by breaking it open, or in any other manner, so as to interfere with the use of it by the public for the purpose of a highway.

These pipes, therefore, being laid below the surface, the Plaintiff might not, without exposing himself to difficulties with the public authorities who are the guardians of the highway, be able to redress the injury in the easy and simple manner which he could if the same thing had been done in an ordinary field.

It is said that the objection of the Plaintiff to the laying of these pipes in his land is an unneighbourly thing, and that his

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right is one of little or no value, and one which Parliament, if it were to deal with the question, might possibly disregard. What Parliament might do, if it were to deal with the question, is, I apprehend, not a matter for our consideration now, as Parliament has not dealt with the question. Parliament is, no doubt, at liberty to take a higher view upon a balance struck between private rights and public interests than this Court can take. But with respect to the suggested absence of value of the land in its present situation, it is enough to say that the very fact that no interference of this kind can lawfully take place without his consent, and without a bargain with him, gives his interest in this land, even in a pecuniary point of view, precisely the value which that power of veto upon its use creates, when such use is to any other person desirable and an object sought to be obtained. Besides which, I am not prepared to accede to the proposition that it is an unneighbourly proceeding in a man, whose motive for desiring to prevent a particular act may be collateral to the interest in his land—such, for instance, as his being a proprietor of waterworks which may be injured by the proposed use of it;—to say to his neighbour who wishes to compete with him in that business, "You are perfectly at liberty to enter into competition with me as a seller of water to the public of *Ramsgate* in any lawful manner; but you are not at liberty to take my land without my consent for the purpose of competing with me, and I shall object to your doing so." In that, I confess, I see nothing unneighbourly whatsoever.

Then what are the actual circumstances of this case? The Plaintiff has certainly been guilty of neither acquiescence nor delay. [His Lordship then stated the facts of the case.]

In that state of things, and looking to the nature of the work, and that it was capable of being so quickly done, and done in that manner, I have no hesitation in saying that I think this Court is bound to deal with the case exactly as it would have done if this bill had been filed, not as it was a few days afterwards, but on the morning of the day, and before any part of the work had been done. I cannot look upon this case otherwise than as a deliberate and unlawful invasion by one man of another man's land for the purpose of a continuing trespass, which is in law a series of trespasses from time to time, to the gain and profit of the trespasser, without the

consent of the owner of the land; and it appears to me, as such, to be a proper subject for an injunction.

The cases which have been referred to are either cases of ancient lights, such as *Durell* v. *Pritchard* (1), or cases of covenants, such as *Bowes* v. *Law* (2), where a man had, once for all, done upon his own land something which exposed him to an action by the other party. In those cases the thing was finished, and in the judgment of the Court it was more equitable, having regard to the consequences of interference or non-interference, to leave the parties to their legal rights and liabilities, or to give damages, rather than to interfere by injunction. No doubt in such a state of things the *quantum* of damage to the Plaintiff, as compared with the *quantum* of loss to the Defendant, is a material consideration; but that consideration does not appear to me to arise in the present case.

The other class of cases is that exemplified by *Deere* v. *Guest* (3), which, when rightly considered, amounted to neither more nor less than an action of ejectment brought in the Court of Chancery without any equitable circumstances to induce that Court to assume jurisdiction. The facts were these: The Defendant had made a tramway and completed it openly, so that everybody interested in the land either did know or might, three years before the bill was filed, have known what was taking place. That had been done lawfully, with the consent of the tenant, subject to some question of waste which I will not enter into. That was a case between landlord and tenant. But so far as the possession was concerned, it had been lawfully acquired by the consent of the then occupying tenant. His occupation continued for about three years afterwards, and, as far as appears from the statement on the bill (for that case arose on demurrer), even when the tenancy ceased the land was re-let to a person who, upon the allegation in the bill, must be taken to have consented, so far as he could consent, to the continuance of the occupation of the tramroad by the Defendant. The bill, however, contained an allegation which Lord *Cottenham* thought obscure, that when the land was re-let the Plaintiff had reserved to himself the tramroad. The allegation was, therefore, that the right to the tramroad or to the posses-

(1) Law Rep. 1 Ch. 244. (2) Law Rep. 9 Eq. 636.
(3) 1 My. & Cr. 516.

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sion of the land had been originally given by the person in occupation, and was confirmed by the person subsequently in occupation, but that he had no right to confirm it. It also appeared that the owner of the equity of redemption had sold to the Defendant the right to have the tramroad, also that the Plaintiff had not even the legal title of mortgagee, for he was only the husband of the administratrix of the mortgagee, and interested in the money only, though no doubt he was entitled to call on the persons who had the legal estate to defend his rights. He had brought an action of trespass against the Defendant on account of this tramroad. In point of law the Defendants, having lawfully got possession three years before, were continuing in possession, and the Plaintiff's title, or rather that of the trustee for him as mortgagee, was a purely legal title on the shewing of the bill, and there was no impediment to an action of ejectment or an action of trespass. In that state of circumstances, Lord *Cottenham* thought—and, in my judgment, was quite right in thinking—that there was no equity whatever to interfere, and that the case was a simple attempt to transfer the jurisdiction in ejectment from law to equity.

Had the circumstances of this case been similar, and had these pipes been laid with the consent of the tenant three years before, and used as part of the system of waterworks during the whole of that interval, and had it been a case of possession, originally legal but now liable to be displaced by ejectment, I have little doubt that I should have come to a similar conclusion. But all the circumstances of the case are entirely different, and the principle upon which this case ought to be dealt with is, in my opinion, that upon which the Master of the Rolls has dealt with it. Therefore I, for my part, cannot give a voice for disturbing the judgment of the Master of the Rolls.

SIR W. M. JAMES, L.J. :—

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I am of the same opinion. The Defendant in this case is admittedly a trespasser. He has committed a trespass upon the Plaintiff's land without any legal justification or any legal excuse whatever; and he proposes to continue that trespass from day to day, keeping the pipes and allowing the water to go through them for the purpose of making a profit of a trade which he proposes to et up in rivalry to a trade which the owner of the land upon

which he is so committing the trespass is interested in. It is said that we ought to allow this to be done, that we ought, in fact, to dismiss the Plaintiff from this Court, and tell him to find his way to another Court, in which he is to bring an action for the wrong for which there is no defence whatever. He is to bring that action at his own cost, and having succeeded in one action, he is to bring a second—I do not know whether more than one will be required—and then, having succeeded in one action, or two actions, or perhaps three actions, all of which, on the facts proved in this case, would necessarily result in verdicts for him, he is to come back to this Court and obtain a perpetual injunction on the ground of repeated vexation and repeated actions.

I do not think that there is any principle in this Court which will compel us to drive the Plaintiff to go through all that litigation before he is entitled to that relief which he would ultimately get when he had gone through it.

It is said that something of the kind was done in *Deere* v. *Guest*. In that case, beyond all question, the *ratio decidendi* (and that is always to be looked at when you are referring to an authority or decision) of Lord *Cottenham* (who affirmed the decision of the Vice-Chancellor) was that the Defendant was a person in possession, and that the bill was a bill in substance brought to turn him out of possession, and to give the possession to the Plaintiff, which would be strictly and simply an ejectment bill, and such a bill is not according to the practice of this Court. Here there is nothing like a possession by the Defendant. The Plaintiff has been in possession, and is in possession, and the Defendant has been a wrong-doer, and a mere trespasser, who proposes to continue so.

The question is whether, under those circumstances, the Plaintiff has not a right to come here, and so to put an end to that continuous trespass which the Defendant has begun and intends to continue, there being no wrong whatever that can be suggested to the Defendant. What is alleged on his behalf here is, that if we grant the injunction we shall deprive him of a very valuable property, because it is essential to the value of his property that he should keep the Plaintiff's property, which has been taken against his consent. Even if the Defendant did originally unconsciously take that which was not his, yet he very soon became conscious

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that it was not his, and that he was taking that which was not his for the purpose of a profit to himself, against the will of the real owner. That is taking another man's property improperly, both morally as well as legally. I am of opinion that the decision of the Master of the Rolls is quite right, and that the injunction ought to be sustained.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I think it is quite clear that the Defendant has not got into possession of any portion of real property of the Plaintiff so as to make it necessary for the Plaintiff to bring an action of ejectment.

It is perfectly true that when a system of waterworks has been legally established, and the owners have made their reservoir, and have legally laid their pipes all along the streets through which they are supplying the water, then the law considers the pipes so far part of the realty that the owners are liable to be rated as in possession of a portion of the realty, and it may be that an ejectment might be brought against them. But in this case the waterworks had not, at the time this bill was filed, been established at all. All that had been done was that the Defendant had entered upon the Plaintiff's land, had dug a trench, and had put pipes at the bottom of that trench. I doubt extremely whether those pipes had become part of the realty at all. If they had, they would have become the Plaintiff's property. But in my opinion there was never any intention to annex them to the soil so as to make them part of the realty, and I am inclined to think that they remained pure chattels. However that may be, it is not necessary to decide the question, because, in fact, the Defendant has committed a trespass. If that had been the only thing done, it would have been right to leave the Plaintiff to recover damages by an action at law; but the Defendant was threatening to continue the trespass—threatening to complete his waterworks, and use as his own that which was really part of the Plaintiff's property, and to make a profit by it. Then there is this further reason for coming to this Court, namely, that, from the peculiar circumstances of the surface of the road being dedicated as a highway, the Plaintiff has not the ordinary remedy which he

would have had if the Defendant had dug a trench and laid pipes across the Plaintiff's field. In this case the Plaintiff would have had great difficulty in himself removing the pipes. Suppose that a similar trespass was committed on a man's soil while he remained in possession, and there was nothing to prevent him digging it up himself, it would be reasonable enough to leave him to remove what had been wrongly put in the soil, and then to bring an action to recover damages. But in the present case it is extremely doubtful whether he could remove the pipes without rendering himself subject to being indicted by the highway board; and in my opinion he is entitled to be relieved from that difficulty.

The appeal must be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Paterson, Snow, & Burney*, agents for Messrs. *M. & O. Daniel, Ramsgate.*

Solicitors for the Defendant: Messrs. *Wright & Pilley.*

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[1873 H. 196.]

Judgment Creditor—Law of Judgments Amendment Act (27 & 28 *Vict. c.* 112), *ss.* 1, 5—*Equity of Redemption*—"*Delivery in Execution.*"

Equitable interests in land are within the 1st section of the 27 & 28 Vict. c. 112. Therefore, if a judgment creditor who has sued out an elegit is unable to obtain delivery by the sheriff of his debtor's lands by reason of the legal estate being outstanding, he must apply to the Court of Chancery to remove the impediment, and the order of the Court will be a delivery in execution within the statute.

A judgment creditor sued out an elegit against his debtor, who had no other interest in land than an equity of redemption, and the sheriff accordingly returned *nil.* Soon afterwards the debtor became bankrupt. The debtor then filed a bill asking for a declaration that he had a charge on the debtor's equity of redemption at the time of the bankruptcy:—

Held, on demurrer (affirming the decision of *Malins*, V.C.), that the creditor had no charge on the land.

THIS was an appeal from a decision of Vice-Chancellor *Malins*, allowing a demurrer to the Plaintiff's bill.

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The bill stated the following facts:—

Henry De Bruno Austin was at the time of his bankruptcy the owner of certain lands and hereditaments in *Middlesex*, subject to certain mortgages in fee, the particulars of which the Plaintiff was unable to discover.

On the 4th of January, 1870, the Plaintiff recovered final judgment against *Austin* in an action of debt for £800, and £3 10*s*. costs, which judgment was registered on the 8th of January, 1870, according to the statute.

On the 8th of January, 1870, the Plaintiff obtained a writ of elegit out of the Queen's Bench, upon the said judgment, against the goods, chattels, lands, and tenements of *Austin*, in *Middlesex*, and the writ was duly registered according to the statute.

On the 16th of January, 1872, the writ of elegit was delivered to the sheriff of *Middlesex*, but in consequence of the existence of the said mortgages and of *Austin's* estate and interest being purely equitable, the sheriff made a return of "*nihil*" to the said writ of elegit.

On the 11th of March, 1872, a petition for adjudication of bankruptcy was presented against *Austin*, under which he was declared a bankrupt, and the Defendant was duly appointed trustee.

The bill prayed that it might be declared that the said judgment constituted a valid charge in equity upon the estate and interest of the bankrupt in the lands, subject to the prior mortgages, or on the surplus proceeds of the sale thereof, and that the Plaintiff's claim might be satisfied out of the same. The bill also prayed for an account of what was due to the Plaintiff for principal, interest, and costs, and that the Defendant might be decreed to pay the same, or in default be foreclosed; and also for a receiver of the rents of the said hereditaments.

To this bill the Defendant demurred for want of equity, and the Vice-Chancellor allowed the demurrer. The Plaintiff appealed from this decision.

Mr. *Glasse*, Q.C., and Mr. *Townsend*, for the Appellant:—

The statute 27 & 28 Vict. c. 112 (1) only applies to such pro-

(1) The sections of this Act principally commented on were the following:—

"Sect. 1. No judgment, statute, or recognizance to be entered up after the passing of this Act shall affect any land

(a) See W.N. (1873) 193.

perty as is capable of being taken by the sheriff in execution. It would be an unreasonable construction of the 1st section of the Act to hold that the Legislature, having by the 1 & 2 Vict. c. 110, s. 13, made judgments a charge on equities of redemption, intended by a side wind to repeal that enactment by directing the judgment creditor to do what is impossible. We therefore contend that the remedies of judgment creditors on equities of redemption remain as before the Act.

In the 5th section it is taken for granted that there may be charges, both prior and subsequent to the charge of the creditor who has obtained execution, which would be impossible if the construction contended for by the other side is correct; for there can be only one elegit on the same land. In this case the judgment creditor had done all he could before the petition for adjudication in bankruptcy was presented. The return by the sheriff is equivalent to delivery in execution in such a case, and if not, a Court of Equity will put the creditor in the same position as to the equitable interest of the debtor as if he had succeeded in obtaining it at law: *Seton* on Decrees (1); *In re Cowbridge Railway Company* (2); *Guest* v. *Cowbridge Railway Company* (3); *Mildred* v. *Austin* (4); *Thornton* v. *Finch* (5); *Earl of Cork* v. *Russell* (6); *In re Duke of Newcastle* (7).

Mr. *J. Pearson*, Q.C., and Mr. *Whitehorne*, for the Defendant:—

The 1st section of the 27 & 28 Vict. c. 112 includes all interests

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(of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority, in pursuance of such judgment, statute, or recognizance.

"Sect. 5. If it shall appear on making such inquiries that any other debt due on any judgment, statute, or recognizance is a charge on any such land, the creditor entitled to the benefit of such charge (whether prior or subsequent to the charge of the petitioner) shall be served with notice of the said order for sale, and shall after such service be bound thereby, and shall be at liberty to attend the proceedings under the same, and to have the benefit thereof; and the proceeds of such sale shall be distributed among the persons who may be found entitled thereto, according to their respective priorities."

(1) 3rd Ed. p. 456.
(2) Law Rep. 5 Eq. 413.
(3) Ibid. 6 Eq. 619.
(4) Ibid. 8 Eq. 220.
(5) 4 Giff. 515.
(6) Law Rep. 13 Eq. 210.
(7) Law Rep. 8 Eq. 700.

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in land; this is put beyond a doubt by the 2nd section, which defines the term "land" as including "all hereditaments, corporeal or incorporeal, or any interest therein." The fallacy of the argument on the other side lies in supposing that there is no other way of obtaining delivery of land except by elegit. The statute expressly says "writ of elegit or any other lawful authority." That includes a decree of the Court of Chancery. The meaning of the statute, therefore, is, that where the debtor has an equity of redemption, or other equitable right, the execution creditor having failed in obtaining an elegit, must get what is equivalent to delivery of the land by a decree of a Court of Equity. Where the impediment to a creditor is merely legal the Court will always assist him to remove the impediment, and will give him a charge subject to the prior incumbrance, and if necessary, a receiver. This construction makes the 5th clause, which contemplates prior and posterior charges, consistent with the 1st section. But the Plaintiff did not come to the Court of Chancery till after the bankruptcy, and therefore, at the time of the bankruptcy, there had been no delivery of the land, and the statute had not been complied with: *In re Cowbridge Railway Company* (1); *Smith* v. *Hurst* (2); *Beavan* v. *Earl of Oxford* (3); *Carter* v. *Hughes* (4).

[They also referred to the statutes 1 & 2 Vict. c. 110; 2 & 3 Vict. c. 11; 3 & 4 Vict. c. 82; 18 & 19 Vict. c. 15; 22 & 23 Vict. c. 35; 23 & 24 Vict. c. 38.]

Mr. *Glasse*, in reply, referred to *Johnson* v. *Burgess* (5).

LORD SELBORNE, L.C.:—

We think that the Vice-Chancellor's decision, allowing the demurrer in this case, was quite right. The preamble of the 27 & 28 Vict. c. 112 expressly states that "it is desirable to assimilate the law affecting freehold, copyhold, and leasehold estates to that affecting purely personal estates, in respect to future judgments, statutes, and recognizances." That shews the object of the statute, which was based upon a large public policy, and that object would fail if the statute failed to assimilate real estates to mere

(1) Law Rep. 5 Eq. 413.
(2) 10 Hare, 30.
(3) 6 D. M. & G. 492, 507.
(4) 2 H. & N. 714.
(5) Law Rep. 15 Eq. 398.

personal estates with respect to the law of judgments; it would fail therefore if the Appellant's contention succeeded, the law being that mere personal estates are not bound by a judgment unless there has been an actual delivery of them in execution. If the sheriff returns *nulla bona* no goods are bound by the judgment.

It is suggested by the Appellant that so great a change as to neutralize the judgment creditor's rights over equitable interests in real estate, given him by the 1 & 2 Vict. c. 110, would not have been made by the Legislature without express words. But it is not correct to say that any change is made in the rights of any person, for the 27 & 28 Vict. c. 112 is only applicable to future judgments. It is, therefore, only a question of public policy. I agree that it might be conceived to be a retrograde policy if the effect of the enactment were entirely to take away all power from the judgment creditor of following the lands of his debtor without driving him to a bankruptcy; though if it had been so, we should be bound by the language of the Legislature. But do the words of the statute bear that construction? The words of the 1st section are of the largest possible description: "No judgment, statute, or recognizance to be entered up after the passing of this Act shall affect any land, of whatever tenure," until a certain thing is done. There is nothing to justify any narrow construction, so as to confine it to land capable of delivery at law by the sheriff. In the 2nd section it is enacted that "the term 'land' shall be taken to include all hereditaments, corporeal or incorporeal, or any interest therein"—the word "incorporeal" including some things which could not be taken by the sheriff under the old law, and were for the first time brought into the power of the judgment creditor by the 11th section of the 1 & 2 Vict. c. 110; and the words "or any interest therein," clearly including equitable interests.

It is said that the words "shall have been actually delivered in execution," shew that the Legislature must have meant things which in their nature were capable of being delivered. There is some force in that argument; and if there were no other way in which interests in land could be delivered except by the sheriff we might have expected to find some mode indicated by which such interests could be got at by the execution creditor. Even in that case, however, we could not have departed from the natural

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construction of the Act. But it does not appear to me that it was intended that all rights of the judgment creditor over equitable interests in land should be taken away; they are, no doubt, only affected so far as they are qualified by the express words. This is consistent with what was said in *In re Cowbridge Railway Company* (1). In that case the late Lord Chancellor *Hatherley*, then Vice-Chancellor, said (2): "It could not have been intended that all the remedies given by the 1 & 2 Vict. c. 110, should be swept away by a side wind." I agree to that observation, especially as it is confirmed by reference to the 1 & 2 Vict. c. 110. That statute largely extended the rights of a judgment creditor, first, by providing that all descriptions of real property of the debtor, and all property of which he had power to dispose, should be charged, as if the charge had been created in writing; and, secondly, the statute made the power of taking in execution all hereditaments universal, without distinction of one kind of hereditament and another; whereas at law some were capable of being taken in execution and others were not.

It is not only a sound but a necessary construction of the late Act, that it leaves untouched all rights given by earlier Acts except so far as it expressly takes them away. If the 1st section had referred in express terms to the 1 & 2 Vict. c. 110, and had said that the land was not to be specifically bound by any judgment by virtue of the 13th section of that Act until the land had actually been delivered in execution, the inchoate right of the judgment creditor given by the previous statute would still remain, and would be an ample foundation for a bill in Equity to get the benefit of that inchoate right by removing any legal obstruction. It was decided in *Thornton* v. *Finch* (3), that although the land was not capable of being specifically bound until taken in execution, yet the inchoate right under the 1 & 2 Vict. c. 110 might be made the foundation of a suit in Equity to remove the legal difficulty in the way of making it a perfect charge. Although the statute is not worded with the exactness desirable in Acts of Parliament, yet on the face of it we have that which shews that the ordinary legal process was not the only mode of obtaining delivery of the land con-

(1) Law Rep. 5 Eq. 413. (2) Law Rep. 5 Eq. 416.
(3) 4 Giff. 515.

templated, for we have the words "or any other lawful authority." I see nothing to confine those words to a sequestration, as has been suggested in argument. Any lawful authority which could cause such a delivery as the subject-matter was capable of, seems to me to satisfy the language of the statute; and in any case in which the judgment creditor must have come into Equity to remove a legal impediment, the judgment and execution issued being the foundation of his right, it appears to me the relief given is substantially a delivery in execution, whether in form it be a writ of assistance or of sequestration, or the appointment of a receiver. In my opinion that would be quite sufficient, and the land would be necessarily bound by the order. Then the judgment creditor would not be in a worse position for getting the fruits of his execution than before the Act. If this is the sound construction, the cases of *In re Cowbridge Railway Company* (1) and *Thornton* v. *Finch* (2) are consistent, and it gets over the difficulty of the language of the 5th section, which contemplates the state of things that there may be other creditors who also have judgments constituting charges on the land. If there were no other mode of delivery except by the sheriff, and if we were to take it as in *Carter* v. *Hughes* (3), that there could be only one return, there would then be a difficulty as to the existence of prior or subsequent charges, because only one charge would be possible. But if the charge can be perfected by the Court of Chancery in case of a legal obstruction, that difficulty is removed.

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This construction is, therefore, required by the authorities, and is satisfactory as removing all difficulties between the different sections. But if the difficulty were greater than it is, as to the way in which creditors having judgments are to work out their rights against equitable interests, we should not be authorized to decide in contradiction to the express words of the Act. I think, therefore, that the Vice-Chancellor was right, and the appeal must be dismissed with costs.

SIR W. M. JAMES, L.J.:—

I am of the same opinion. Independently of the difficulty arising from the 5th section, it appears to me that the words of

(1) Law Rep. 5 Eq. 413. (2) 4 Giff. 515.
(3) 2 H. & N. 714.

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the statute are too plain to admit of reasonable doubt. By the 1st section it is said that no judgment shall affect any land until such land shall have been actually delivered in execution. This delivery in execution must be understood, having regard to the subject-matter. It is not everything which in the nature of things can be passed from hand to hand, but there must be some delivery, actual or symbolical. If it is land, it may be delivered by the sheriff under an extent; but if the interest is equitable, as in this case, there is nothing which the creditor can get by extent, and some other kind of delivery is necessary. The 5th section certainly presents a difficulty. It is said that there could be nothing to which the 5th section could apply, for there could be only one elegit, and therefore no other charges, either prior or subsequent. That might have obliged us to seek some other construction; but I am not satisfied that there is any necessary inconsistency between the 1st and 5th sections. There may well be charges existing consistently with the 1st section besides the charge of the creditor who has obtained execution. In the present case the Appellant had no charge before the date of the bankruptcy. This bill was not filed till after that time.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I think the difficulty of the 1st section is removed when we consider the real meaning of the words "delivered in execution." The sheriff does not give the creditor actual possession of the land itself, but the effect of his return is, that it vests the legal estate in the creditor. The creditor can then bring ejectment, if it is an estate in possession, or he can sue for the rent, if it is a reversion. That being so, when we come to equitable interests the question is, what is it that vests the debtor's estate in the creditor? The order of the Court of Chancery effects as to equitable interests what the action of the sheriff does as to legal estates. That answers the difficulty as to equitable interests, and I see no reason why we should not follow the natural construction of the Act.

Solicitors: Messrs. *Hurford & Taylor*; Messrs. *Sheffield & Sons*.

MEYRICK *v.* LAWS.

MEYRICK *v.* MATHIAS.

[1853 M. 65.]

L. C. and L. JJ.
1874
Feb. 9.

Will—Shifting Clause—Re-settlement—Diminution of Quantity of Estate.

A testator gave his *Pembrokeshire* estates in trust for *T. C.* (second son of *S. C.*) for life, with remainder to his first and other sons successively in tail male, with remainder to the Plaintiff for life, with remainders over; and declared that if *T. C.* or his issue male should become entitled in possession to the estates in *Shropshire* settled on the marriage of *S. C.* (the father of *T. C.*), the trust for *T. C.* and his issue male should cease, and the *Pembrokeshire* estates should go to the person next entitled in remainder as if *T. C.* were dead without issue. At the date of the will the *Shropshire* estates stood limited, under *S. C.*'s marriage settlement, to the use of *S. C.* for life, with remainder to his first and other sons successively in tail male.

S. C. and his eldest son disentailed the *Shropshire* estates, and limited a small portion of them to *S. C.* in fee, and re-settled the rest to such uses as *S. C.* and his eldest son should appoint, with remainder to *S. C.* for life, with remainder to his eldest son for life, with remainder to his first and other sons in tail male, with remainder to such uses as *S. C.* and *T. C.* should appoint, with remainder to *T. C.* for life, with remainder to his first or other sons in tail male. By this settlement powers were given to *S. C.*, to his eldest son, and to *T. C.*, to charge certain sums on the estate. *S. C.*'s eldest son died without issue, and then *S. C.* and *T. C.*, in exercise of their joint power of appointment, re-settled the *Shropshire* estates after the death of *S. C.* to the use of the eldest daughter of *T. C.* for life, with divers remainders over until the entail in the *Pembrokeshire* estates should be barred, and as soon as that event should happen, to the use of *T. C.* for life, with remainder to his first and other sons in tail male. On the death of *S. C.* the Plaintiff claimed to be let into possession of the *Pembrokeshire* estates, on the ground that the shifting clause had taken effect:—

Held, that, inasmuch as *T. C.* acquired an interest in the *Shropshire* estates under what was substantially a new title, and the estates were, moreover, diminished in quantity, the shifting clause did not take effect.

THE suit of *Meyrick* v. *Mathias* was heard in the first instance before the Court of Appeal by special leave, a petition in *Meyrick* v. *Laws* coming on at the same time.

Thomas Meyrick, by his will, dated the 11th of May, 1837, devised his *Pembrokeshire* estates to the use of *E. Laws* and *C. P. Dimond*, and their heirs, upon trust for his grandson, *Thomas Charlton* (the second son of *St. John Chiverton Charlton*), for life,

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without impeachment of waste, with remainder in trust for the first and other sons of *Thomas Charlton* successively in tail male, and in default of such issue in trust for the Plaintiff *William Meyrick* for life, without impeachment of waste, with remainder in trust for his first and other sons successively in tail male, with divers remainders over. The will contained the following proviso:—

"Provided always, and I do hereby declare, that if the said *Thomas Charlton* or his issue male should, either in my lifetime or after my decease, become seised or entitled in possession to the estates settled on the marriage of *St. John Chiverton Charlton*, situate in the county of *Salop*, then the trust of my said real estate in favour of the said *Thomas Charlton* and his issue male shall absolutely cease, and my said estates shall go to the person next beneficially entitled in remainder under the trusts hereinbefore contained, in the same manner as if the said *Thomas Charlton* were then deceased without issue male, subject nevertheless to any act which may have been done in exercise of any of the powers herein contained."

It was also provided that *Thomas Charlton* should, within twelve months after attaining the age of twenty-one, assume the surname of *Meyrick*, with a forfeiture clause in case of his non-compliance with the proviso.

The testator died on the 29th of September, 1837.

At the time of his death the *Shropshire* estates referred to in his will as the estates settled on the marriage of *St. John Chiverton Charlton*, stood limited by virtue of his marriage settlement, dated the 16th of June, 1820, to such uses as *William Charlton* (the father of *St. John C. Charlton*) and *St. John C. Charlton* should jointly appoint, and, subject to such appointment, and subject to certain charges therein mentioned, to the use of *William Charlton* for life, with remainder to the use of *St. John C. Charlton* for life, with remainder to trustees for 500 years, for raising portions for younger children, and subject thereto to the use of the first and other sons of *St. John C. Charlton* successively in tail male, with divers remainders over.

St. John C. Charlton had two sons, *St. John William Charlton* and the said *Thomas Charlton*.

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On the 22nd of March, 1854, *St. John C. Charlton* and his eldest son, *St. John William Charlton*, executed a disentailing deed, whereby they limited a portion of the *Shropshire* estates, called *Oakengates*, to *St. John C. Charlton* in fee, and the rest of the estates to such uses as *St. John C. Charlton* and *St. John William Charlton* should jointly appoint, and, subject to such appointment, to the use of *St. John C. Charlton* for life, with remainder to the use of *St. John William Charlton* in tail male, with remainders over.

By an indenture dated the 23rd of March, 1854, *St. John C. Charlton* and *St. John William Charlton*, in exercise of their joint power of appointment, appointed the *Shropshire* estates which were subject to the power to such uses as they should jointly appoint, and, subject to such appointment, to the use of *St. John C. Charlton* for life, with remainder to the use of *St. John William Charlton* for life, with remainder to the first and other sons of *St. John William Charlton* successively in tail male, with remainder to such persons as *St. John C. Charlton* and *Thomas Charlton* should jointly appoint, and, subject to such appointment, to the use of *Thomas Charlton* for life, with remainder to his first and other sons successively in tail male, with divers remainders over. And the indenture contained a power to *St. John C. Charlton* to charge the estates with £15,000 for his younger children, and to each of the said *St. John William Charlton* and *Thomas Charlton* to charge the estates with sums not exceeding £15,000, for a like purpose.

St. John C. Charlton, by subsequent deeds, exercised his power of charging the estates with the sum of £15,000.

St. John William Charlton died on the 30th of October, 1864, without having been married.

On the 16th of February, 1866, *St. John C. Charlton* and *Thomas Charlton* executed a deed, whereby, in exercise of their joint power of appointment, and subject to the life estate of *St. John C. Charlton*, they limited the estates to such uses as they should jointly appoint, and in default of such appointment to the use that the wives of *St. John C. Charlton* and *Thomas Charlton* should receive certain rent-charges of £1700 and £1000 respectively, and, subject thereto, to the uses following, that is to say: In case the estate tail male in the *Pembrokeshire* estates limited by the will of the said *Thomas Meyrick* in trust for the first and other sons of *Thomas Charlton*

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should be then subsisting, then in the meantime, and until the same estate in tail male and all remainders expectant thereupon should be barred either in the lifetime of *Thomas Charlton* or of *Frederick Charlton*, his only son then born, or within twenty-one years after the death of the survivor of them, or the said estate tail male should within the same period cease, the said estates thereby appointed should remain and be to the use of *Dora Rhoda*, then the only daughter of the said *Thomas Charlton*, with remainder to her first and other sons successively for life, with divers remainders over during the same period, and after the determination or expiration of the same period to the use of the said *Thomas Charlton* during his life, with remainder to the use of his first and other sons successively in tail male, with divers remainders over.

St. John C. Charlton died on the 23rd of February, 1873.

The original bill (*Meyrick* v. *Laws*) was filed by *William Meyrick* and his eldest son, and the trustees of *Thomas Meyrick's* will, and *Thomas Charlton*, who had taken the name of *Meyrick* in accordance with the direction contained in the will (but is called in this report *Thomas Charlton*), for the administration of the trusts of the will; and his eldest son was afterwards brought before the Court by supplemental bill (*Meyrick* v. *Mathias*), which stated the facts subsequent to the filing of the original bill.

On the death of *St. John C. Charlton* the Plaintiff presented a petition, praying a declaration that the shifting clause in the testator's will had taken effect; and that the Plaintiff, *William Meyrick*, might be put into possession of the *Pembrokeshire* estates. The suit came on for further consideration at the same time with the Petition.

Mr. *Southgate*, Q.C., Mr. *Jackson*, Q.C., and Mr. *Rowcliffe*, for the Plaintiffs:—

We admit that if the settlement of the *Shropshire* estates had been entirely broken, and the estates conveyed to a stranger and then reconveyed to the Defendant *Thomas Charlton*, the shifting clause would not have taken effect; but the dealings with these estates only amount to a modification of the original settlement. The effect of the last settlement, in February, 1866, by which life

estates were given to *Thomas Charlton's* infant daughter and her sons previous to his own death, was to give the management and enjoyment of the income of the estates to him. The condition in the shifting clause in this case is, not that the estates should come to *T. Charlton* and his issue under the settlement, but, generally, if he or they become seised or entitled to them in possession; and such a condition ought to be construed according to its literal meaning, for neither party has a better equity than the other. As to the charges which have been created on the *Shropshire* estates, the Plaintiffs have a right to redeem them, and they are willing to do so.

[They referred to *Harrison* v. *Round* (1); *Monypenny* v. *Dering* (2); *Micklethwait* v. *Micklethwait* (3); *Fazakerly* v. *Ford* (4); *Taylor* v. *Earl of Harewood* (5); *Rumbold* v. *Rumbold* (6); *Davidson's* Precedents in Conveyancing (7).]

Mr. *Fry*, Q.C., Mr. *G. Law*, and Mr. *Spencer Butler*, for the Defendants *T. Charlton* and his son, were not called on.

Mr. *T. Rawlinson*, for the trustees.

LORD SELBORNE, L.C., delivered the judgment of the Court as follows:—

We have none of us any doubt in this case. Of course the whole question depends on the construction of this shifting clause in the will of the testator, *Thomas Meyrick*. Now the words of the clause are these: "I do hereby declare that if the said *Thomas Charlton* or his issue male should, either in my lifetime or after my decease, become seised or entitled in possession to the estates settled on the marriage of the said *St. John Chiverton Charlton* situate in the county of *Salop*"—then the estates which he devises are to go over as if *Thomas Charlton* were then deceased without issue male. The question, therefore, which arises is a very simple one, quite distinct from anything like a doubtful or conflicting or uncertainly-expressed intention of a testator, such as may have

(1) 2 D. M. & G. 190.
(2) Ibid. 145.
(3) 4 C. B. (N.S.) 790.
(4) 4 Sim. 390; 1 A. & E. 897.
(5) 3 Hare, 372.
(6) 3 Ves. 65.
(7) 3rd Ed. vol. iii. p. 348.

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existed in some of the cases referred to. The question is, whether the testator there means to provide for the event of the *Shropshire* estates going to *Thomas Charlton* or his issue male, under the settlement to which he refers. I cannot but think that, on the same principle upon which Sir *James Wigram*, in *Taylor* v. *Earl of Harewood* (1), held that the mention of entailed estates was not merely an historical description of a pre-existing fact, but was intended to shew the title under which the event was to take place, so here the word "settled" in this context has exactly the same force and effect; for nothing could be more absurd and unreasonable than to suppose that the testator meant the *Pembrokeshire* estates to go over in the event of the acquisition at any time, and by any title whatsoever, of the *Shropshire* estates by any descendant of *Thomas Charlton*. The mention of *Thomas Charlton* or his issue male in connection with the mention of the existing settlement, proves that the testator had in view a title and a right which might arise under the existing settlement. It was almost admitted in the argument that that was so; because, as I understood Mr. *Jackson*, he felt that he could not, in the face of the authorities, contend that if the *Shropshire* estates had come to *Thomas Charlton* or his issue male by descent or devise, after some other person had acquired the fee simple, the shifting clause would have taken effect. But if that be the meaning of the shifting clause, I cannot see on what ground those cases can be distinguished.

The simple question is, Has the event contemplated by the testator happened? It appears to me no more necessary for us in this case than for Sir *James Wigram* in the case of *Taylor* v. *Earl of Harewood* to decide any abstract question, whether every form of re-settlement would necessarily destroy the identity of the title. We had better deal with each such question when it arises according to the nature and terms of the settlement, the persons who make it, and the persons who take under it. In *Harrison* v. *Round* (2) we have an instance of a re-settlement which was held to be a continuation of the title, where the next descendant took substantially the same estate under the new settlement. In such a case, if the estate remains undiminished in quantity, it is held to

(1) 3 Hare, 372. (2) 2 D. M. & G. 190.

be merely a modification of his original title; and if it is diminished in value for his benefit, he is considered merely to have anticipated his interest. We must deal with all such cases as they occur. In this case it is clear that we have not only a re-settlement by virtue of the absolute power over the fee simple vested in different persons from the person now taking as tenant for life, but we have also a different subject-matter; because from the re-settlement there had been subtracted, not in his favour, but in favour of other persons, the whole of a particular property, the *Oakengates*, which the father, with the consent of the eldest son, took out of the settlement for his own benefit; and we have, as it is admitted, large charges laid upon the estate which destroy its identity in point of quantity and value. I do not think the authorities are in any degree open to question, which say that those circumstances prevent the condition being fulfilled which is to defeat the gift. Something of the same kind happened in the case of *Gardiner* v. *Jellicoe* (1), where, (though the case did not mainly turn on this point,) Sir *W. Erle*, C.J., said (2): "It appears by the admissions that the lands formerly part of those comprised in the *Gardiner* property are only a small part, held under a new title, and subject to incumbrances that could not have been imposed on the estate tail if the Plaintiff had taken it under the devise. Though he holds some of the same lands he has not in substance the same amount of property, nor in title the same estate, as that to which the shifting clause referred." As far as I know, all the cases on the subject are consistent with this view. Therefore in our opinion the Petition must be dismissed with costs; and, as the Plaintiffs had no claim to the estates devised by the testator except under the shifting clause, the supplemental bill must also be dismissed with costs.

Solicitors for the Plaintiffs: Messrs. *Gregory, Rowcliffes, & Rawle.*

Solicitors for the Defendants: Messrs. *Law, Hussey, & Hulbert.*

(1) 12 C. B. (N.S.) 568. (2) 12 C. B. (N.S.) 637.

L. C. and L. JJ. 1874 Feb. 12.

BARNES *v.* ADDY.

[1870 B. 92.]

Breach of Trust — Constructive Trustee—Complicity in Breach of Trust — Solicitor, Liability of—Appointment of Sole Trustee who misapplies Funds — Costs, adding Defendants for.

A stranger who acts as the agent of a trustee in a transaction legally within his power, but which leads to a breach of trust, is not to be held responsible as a constructive trustee unless some of the property passes into his hands, or unless he is cognisant of a dishonest design on the part of the trustee.

The Court discourages the practice of making solicitors or other agents who are not primarily liable for the loss of property, and who ought to be made witnesses, Defendants to a suit for the purpose of charging them with costs.

A., the surviving trustee of a fund, one moiety of which was settled upon his wife and children, and the other moiety upon the wife and children of *B.*, in exercise of a power in the settlement, appointed *B.* sole trustee of half the fund, taking an indemnity from him, and retained the other half in his own name. *B.* sold out and misapplied the moiety of the fund transferred to him, and became bankrupt. *A.'s* solicitor advised him against the appointment of *B.* as sole trustee, but prepared the deeds of appointment and indemnity, and introduced him to a broker for the purpose of selling out some of the stock to pay some costs to which it was liable, and the same broker afterwards transferred a moiety of the residue to *B.* *B.* employed another solicitor, who warned *B's* wife of the risk attending the proposed transaction, but settled the deed of indemnity on her behalf:—

Held (affirming the decision of *Wickens*, V.C.), in a suit by *B.'s* children, seeking to make *A.* and the two solicitors responsible for the fund which was lost, that as neither of the solicitors had any knowledge of, or any reason to suspect, a dishonest design in the transaction, and as the fund had not passed into their hands, the bill must be dismissed against them both with costs.

THIS was an appeal from a decision of Vice-Chancellor *Wickens*.

The Plaintiffs in the suit were the children of *Henry Norman Barnes* and *Ann Barnes*, being the grandchildren of *William Addy*, the testator in the suit. The Defendants were *John William Addy*, who died during the progress of the suit, and *William Ward Duffield*, and *William Richard Preston*, solicitors.

The testator, by his will, dated the 25th of November, 1835, appointed *William Crush*, *John Lugar*, and his nephew *John William Addy*, to be his executors and trustees, and the guardians

of his infant children. He devised and bequeathed his real and personal estates to his trustees upon trust to sell and convert the same, and to invest the proceeds thereof, and after giving an annuity of £100 to his widow, he declared that the residue should be held in trust for his daughter *Ann*, his daughter *Susan*, his son *William John*, and his daughter *Mary Myhill* equally. He then settled the share or portion of his daughter *Ann* upon her for her life, for her sole and separate use, free from the contracts or control of her husband, and without power of anticipation, and after her death for her children as she should by deed or will appoint, and in default of any such appointment, and so far as any such should not extend, the share was to be held upon trust for such of her children as should attain twenty-one equally; with the usual survivorship and maintenance clauses. The testator then settled the share of his daughter *Susan* in like manner.

The will contained a power of appointing new trustees, which was vested in his executors, without the consent of any other person. The power was in the usual form, but contained no authority to diminish the number of trustees.

The testator died on the 15th of December, 1835, leaving his widow and the four children named in his will.

W. Crush renounced probate, and disclaimed the trusts of the will, which was proved on the 18th of March, 1836, by *J. Lugar* and *J. W. Addy* alone.

The total amount of the estate which came to the hands of *J. Lugar* and *J. W. Addy* (after appropriating £2000 to answer the annuity) was about £9000, which they invested in their names in consols.

On the 7th of November, 1837, *Ann Addy* married *H. N. Barnes*, and the six Plaintiffs were their children. In 1846 *Susan Addy* married *J. W. Addy*.

J. Lugar and *J. W. Addy* appointed *George Adams Clark* a trustee of the will in the place of *W. Crush*. *J. Lugar* died in 1852, and *G. A. Clark* died in February, 1857, leaving *J. W. Addy* the sole trustee of the will.

Mr. *James Parker* acted as the solicitor of the executors and trustees of the will till 1851, when Mr. *W. W. Duffield* became the solicitor of *J. W. Addy*, in the place of Mr. *Parker*.

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The shares of the testator's son *William John Addy*, and his daughter *Mary Myhill Addy* (who married *John Barlow*), were afterwards sold out and paid to them, and the only shares remaining subject to the trusts were the shares of Mrs. *Barnes* and Mrs. *Addy*.

H. N. Barnes was not on good terms with *J. W. Addy*, and filed a bill against him, charging him with breaches of trust, and placed a distringas on the stock, but on the 4th of March, 1857, a meeting took place between them in the presence of Mr. *Barlow* and Mr. *Duffield*, at which it was agreed that the bill should be dismissed, and the costs of the *Barnes* family, who were the Plaintiffs, borne by them, and the costs of the trustees paid equally out of the shares of Mrs. *Barnes*, Mrs. *Addy*, and Mrs. *Barlow*.

No mention was made at that meeting of the appointment of a new trustee of the fund, but it was alleged by the Plaintiffs, although the fact was not admitted by *J. W. Addy*, that there had been a previous arrangement that the fund should be divided, and that *Barnes* should be the sole trustee of Mrs. *Barnes's* share, and *J. W. Addy* of Mrs. *Addy's*. However when the agreement for the withdrawal of the suit had been carried out, *J. W. Addy* called on Mr. *Duffield* and told him that he had made up his mind to retire in favour of *Barnes*. Mr. *Duffield* advised him not to do so, and pointed out to him the risk there was of a misapplication of the trust fund when it was put in the power of a sole trustee. *J. W. Addy* told Mr. *Duffield* that he did not consider there was any real risk in the case, as he had no doubt that *Barnes* would consult the interests of his wife and children, and duly execute the trusts in their favour; and that, rather than endure a continuance of the annoyance he had experienced from the *Barnes* family, he was determined to take such risk. He thereupon gave Mr. *Duffield* positive directions to prepare at once the deeds necessary for carrying out his intention. Mr. *Duffield* then advised him that, at all events, he should take a deed of indemnity from *Barnes;* and said he would see Mr. *Parker*, and tell him of *J. W. Addy's* determination. Upon that Mr. *Duffield* saw Mr. *Parker* on the subject, and, at his request, sent him a draft deed for the appointment of a new trustee of the will, so far as regarded the share of Mrs. *Barnes* and her children, and of a deed of indemnity, for approval, on behalf

of the *Barnes* family. Mr. *Parker* soon afterwards returned the deeds to Mr. *Duffield* with a verbal message that he declined, for personal reasons, to approve of them. *J. W. Addy* was informed of Mr. *Parker's* refusal, but he still urged Mr. *Duffield*, in spite of his reiterated objections, to get the matter settled. He told Mr. *Duffield* that he wished to get rid of the expense and annoyance to which he had been so long put by the *Barnes* family, and said, that although he regretted acting contrary to his advice, yet his mind was made up, and he wished the business carried through and completed as speedily as possible.

About the same time *Barnes* called on Mr. *Duffield*, and told him that he had just seen Mr. *Parker*, whereupon Mr. *Duffield* told *Barnes* that he was determined not to proceed further in the matter of the appointment, unless the drafts were perused and approved in the ordinary way by some solicitor on behalf of his wife and children. *Barnes* then said he had made up his mind to consult another solicitor, whom he would instruct to communicate with Mr. *Duffield*. *Barnes* then called on Mr. *Preston* and told him that there was a matter of business which his wife and he wished him to undertake on their behalf; that his wife was entitled to some property under her father's will; that her cousin, *J. W. Addy*, was the trustee of the will, but that he refused to act any longer in the trusteeship, and had finally determined to retire therefrom; and that it had been arranged by all parties that *Barnes* should be appointed to be the trustee in his place, and that his wife and he wished Mr. *Preston* to look over the deeds on their behalf. *Barnes* also told Mr. *Preston* that the whole matter had been fully discussed and arranged among the parties concerned, and that his wife had had fully explained to her and fully understood the whole business, and wished and had authorized him to instruct Mr. *Preston* to act on her behalf as well as his. Mr. *Preston* then informed Mr. *Duffield* of the instructions which he had received, and Mr. *Duffield* thereupon sent him the drafts for perusal, on behalf of *Barnes* and his wife and children.

When Mr. *Preston* had received the drafts of the deeds from Mr. *Duffield* (together with a copy of the testator's will), he, on the 13th of March, 1857, sent the following letter to Mrs. *Barnes*:—

"Dear Madam,—I have received from Mr. *Duffield* the draft

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deed appointing Mr. *Barnes* (your husband) the sole trustee of the property left to you for your life under the will of *William Addy*, deceased, in the place and stead of Mr. *John Addy*, who is now himself also the only surviving trustee of Mr. *William Addy's* will. I believe the matter has been fully discussed as to this appointment between the parties interested, and fully explained to you before my being employed in the matter; but as I fear you are more interested than any one else both on behalf of yourself and children, whose interest you will be anxious to protect, and my instructions having in the first instance come from your husband, I am anxious to have, in writing from you, your express desire that the appointment should be made of your husband in lieu of Mr. *John Addy*. I think it right at the same time to inform you that as such trustee your husband will have full control of the funds, and can do as he likes with them, unless some measures are taken, such as the appointment of himself jointly with another, to prevent his doing so, and which I shall be happy to receive any instructions from you to carry out, if you desire it. I have been thus particular in the matter as I think it my duty to inform you of what the consequences of the appointment might be, and that you may act with that which I think you are entitled to, namely, a full knowledge of the facts and circumstances attending such sole appointment. Awaiting your reply,

"I am, dear Madam, yours faithfully,

"*W. R. Preston.*

Mrs. *Barnes* wrote to Mr. *Preston* in reply, as follows:—

14th March, 1857.

"Dear Sir,—In reply to your letter to me of yesterday's date, I am fully aware of the proposed arrangement of appointment of my husband as trustee in the place of Mr. *John Addy*, under the will of my late father, which it is my wish and desire should be carried out.

"I am, dear Sir, yours respectfully,

"*Ann Barnes.*"

Thereupon Mr. *Preston* perused and approved of the draft deed of appointment on behalf of *Barnes* and his wife, and of the draft deed of indemnity on behalf of *Barnes*, and returned the drafts to

Mr. *Duffield*. Mr. *Duffield* sent them back to Mr. *Preston*, and requested him to get them engrossed for execution. The deeds were shortly afterwards executed by Mr. and Mrs. *Barnes* at the office of Mr. *Preston*, and then taken away by *Barnes*, who paid Mr. *Preston* £25 (of which about £10 were costs out of pocket) in respect of his costs, relating to the perusal, approval, and execution of the deeds.

J. W. Addy and his wife had no issue, and they had from time to time received the whole of their share of the estate.

With respect to the transfer of the funds which represented the share of Mrs. *Barnes* and her children into the sole name of *Barnes*, it was proved that on the 31st of March, 1857, *J. W. Addy* met Mr. *Duffield* by appointment at his agent's, for the purpose of going to a broker's to sell out so much stock as would pay the trustees' costs of the arranged suit, and also some of Mrs. *Barlow's* stock which had not been paid over to her or her trustees. *Barnes* met them, having heard of the appointment, and insisted on accompanying them to the brokers. Mr. *Duffield* introduced *J. W. Addy* to the brokers, as the vendor of so much of the stock only as was specifically required for the payment of the costs and the other purposes above mentioned; but in no way interfered further in the matter. *J. W. Addy* then completed the transfer, on his own responsibility, of the share of Mrs. *Barnes* and her children, viz. of the sum of £2074 17*s.* 8*d.* £3 per Cent. Consols, into the sole name of *Barnes*. The sum so transferred was the residue of the sum of £2140 5*s.* 6*d.* like stock, after deducting £65 7*s.* 10*d.*, the one-third of the trustees' costs of the *Barnes*' suit, and payable out of Mrs. *Barnes*' share, as agreed upon at the meeting of the 4th of March, 1857.

On the 1st of April, 1857, *H. N. Barnes* sold out the same sum of £2074 17*s.* 8*d.*, and used the proceeds in his business. He became bankrupt on the 25th of February, 1858, and obtained his certificate on the 8th of February, 1859. He did not prove as trustee for the £2074 17*s.* 8*d.* consols in the bankruptcy. Some dividend was paid under the bankruptcy; but no estate was left, or recoverable in any way, when this suit was instituted.

The bill prayed for a declaration that the appointment of *Barnes* as the sole trustee of the testator's will was a breach of

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duty and trust on the part of *J. W. Addy*, and a fraud upon the power to appoint new trustees contained in the will; that such appointment should, if necessary, be declared void, and set aside; that the transfer made by *J. W. Addy* into the name of *Barnes* as such newly appointed sole trustee, was not only a breach of trust and duty on the part of *J. W. Addy*, but also a fraud on the part of *J. W. Addy* and Mr. *Duffield* and Mr. *Preston*, and that *J. W. Addy* and Mr. *Duffield* and Mr. *Preston* were liable and bound to answer for and make good the sum of £2140 5*s.* 6*d.* £3 per Cent. Consols, and also the amount of the dividends which would have accrued and become due upon or in respect of the same sum, in case it had not been transferred to *Barnes;* for all necessary and proper accounts; and that the Defendants might be respectively compelled to pay all the costs of and consequent upon this suit.

J. W. Addy died on the 20th of March, 1872. His widow took out administration to his estate, and the suit was revived against her.

The Vice-Chancellor dismissed the bill with costs against Mr. *Duffield* and Mr. *Preston*, but declared that *J. W. Addy's* estate was liable to replace the fund which had been lost, and directed that if the administratrix did not admit assets the accounts of his estate should be taken, and his assets applied in a due course of administration. From this decree, so far as it dismissed the bill against Mr. *Duffield* and Mr. *Preston*, the Plaintiffs appealed.

Mr. *Greene*, Q.C., and Mr. *Bilton*, for the Appellants:—

The only question now before the Court, is as to the liability of the two solicitors who were employed. There was a breach of trust in transferring the fund to *Barnes*, independently of his subsequent breach of trust in appropriating it to his own use. It was a threefold breach of trust; first, in appointing a single trustee; secondly, in transferring of the stock into his sole name; and thirdly, in dividing the fund so that there should be a separate trustee for each part. Mr. *Preston*, by his own letter, shews that he was alive to the danger of this course, and he ought to have declined to undertake the business rather than to assist in the perpetration of the breach of trust. Mr. *Duffield's* case was still worse, because he prepared the appointment of new trustees

and the indemnity. Although he did not know of *Barnes'* intended misappropriation of the fund, he assisted him to commit the breach of trust, and must be held liable for the consequences of his conduct: *Lee* v. *Sankey* (1). At all events, the two solicitors ought to pay the costs of the suit which has been rendered necessary by their conduct. It is true that the Court discourages persons being made parties merely for the sake of making them pay costs; but in this case substantial relief was sought against these Defendants: *Bennet* v. *Vade* (2); *Fyler* v. *Fyler* (3); *Bowles* v. *Stewart* (4).

Mr. *Lindley*, Q.C., and Mr. *Begg*, for Mr. *Duffield*; and Mr. *W. Pearson*, Q.C., for Mr. *Preston*, were not called on.

Mr. *B. B. Rogers*, for *J. W. Addy's* administratrix.

LORD SELBORNE, L.C.:—

It is equally important to maintain the doctrine of trusts which is established in this Court, and not to strain it by unreasonable construction beyond its due and proper limits. There would be no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them.

Now in this case we have to deal with certain persons who are trustees, and with certain other persons who are not trustees. That is a distinction to be borne in mind throughout the case. Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust

(1) Law Rep. 15 Eq. 204.
(2) 2 Atk. 324.
(3) 3 Beav. 550.
(4) 1 Sch. & Lef. 209.

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property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees. Those are the principles, as it seems to me, which we must bear in mind in dealing with the facts of this case. If those principles were disregarded, I know not how any one could, in transactions admitting of doubt as to the view which a Court of Equity might take of them, safely discharge the office of solicitor, of banker, or of agent of any sort to trustees. But, on the other hand, if persons dealing honestly as agents are at liberty to rely on the legal power of the trustees, and are not to have the character of trustees constructively imposed upon them, then the transactions of mankind can safely be carried through; and I apprehend those who create trusts do expressly intend, in the absence of fraud and dishonesty, to exonerate such agents of all classes from the responsibilities which are expressly incumbent, by reason of the fiduciary relation, upon the trustees.

Now, what is there in this case to make either of these two solicitors responsible as a constructive trustee for the breaches of trust which were in fact committed by Mr. *Barnes*, and for which Mr. *Addy* was also responsible? The facts appear to be neither more nor less than these: that Mr. *Duffield* had, on the part of Mr. *Addy*, prepared an instrument appointing Mr. *Barnes* to be trustee of what I may call the *Barnes*' share of a certain trust fund, of which Mr. *Addy* was at that time sole trustee, and that he afterwards introduced Mr. *Addy* to a broker for the purpose of the sale of a part of the trust fund which was sold for the payment of certain costs. That is the case as against Mr. *Duffield*. As against Mr. *Preston*, the case is simply that he, as the solicitor of Mr. *Barnes*, perused and approved the instrument by which Mr. *Barnes* was to be appointed a trustee of the *Barnes*' share of the trust property in Mr. *Addy's* place.

To take the latter case first, what are the principles on which Mr. *Preston* can be held responsible for that? There is not the slightest trace whatever of knowledge or suspicion on his part of an improper or dishonest design in the transaction. There was nothing to lead him to suppose that Mr. *Barnes*, when he had been so appointed a trustee (assuming the appointment to be followed up by a transfer, which was after all a thing made neither more

easy nor less easy by what Mr. *Preston* did), intended to sell out the fund and put the money into his own pocket. He was called in as a solicitor to approve a form of deed which a person having the legal power proposed to execute. That was not quite a correct thing to do on the part of the person having the legal power, but no authority has been cited to shew that a solicitor would be responsible in such a case; and if we were to hold that he became a constructive trustee by the preparation of such a deed, never having at any moment of time had any part of the trust fund in his possession, and not having enabled any one, who otherwise might not have had the power, to commit a breach of trust, we should be acting not only without authority, but, as I fully believe, against authorities which might have been referred to, and making it nearly impossible for any person safely to act as a solicitor for any retiring trustee or any incoming trustee, unless he takes upon himself the office of a Court of Equity, and satisfies himself that there is nothing which can by any possibility be called in question in any part of the transaction. I am not prepared to hold that a solicitor is under any such responsibility, and as to Mr. *Preston*, I entirely concur with the Vice-Chancellor, who did not think it necessary to hear the Defendant's counsel.

The case as to Mr. *Duffield*, when carefully examined, goes very little beyond that, and not at all, I think, beyond it in anything material to the alleged equity. In addition to the settlement for Mr. *Addy*, the proposed appointor, of the appointment of Mr. *Barnes* as a trustee, he also prepared a deed of indemnity to be executed by *Barnes* to *Addy*; and he admits that he was aware that, as a general rule, it was not a safe thing for a trustee to transfer a trust fund to a single new trustee, however regularly appointed, and therefore he advised his client against it. He says he advised against it from the beginning to the end, on that ground and that principle, not at all apprehending, and having no reason to apprehend, any dishonest purpose on the part of either *Addy* or *Barnes*, and he advised his client, if he did make a transfer, to have a deed of indemnity. I confess I cannot see how upon those grounds we could hold him a constructive trustee, and liable for a breach of trust, by either *Barnes* or *Addy*, unless we were prepared to go the length of saying that in every case in which, a doubtful transaction

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being contemplated between trustee and *cestui que trust*, a deed of indemnity is provided to make the trustee safe, the solicitor who prepares the deed is himself liable; because, in every such case, the same circumstances in principle must occur; namely, that it is apparent that the transaction may not be authorized by the terms of the trust, and that a Court of Equity may hold the trustee liable; and for that reason he takes an indemnity. It would be an alarming doctrine if we were to lay down, assuming honesty of purpose and the absence of fraud, that the solicitor is in such a case made a constructive trustee; and we are not going to be the first Judges to lay down that doctrine, it certainly not having been laid down by any of our predecessors.

Now, ought or ought not Mr. *Duffield*, (for as to Mr. *Preston* there is really no question), from the circumstances of the case, to be held to have been aware that something wrong was intended? There is not a scintilla of evidence that he was aware of anything of the kind. He swears positively that he was not, as does Mr. *Preston*, and Mr. *Addy* swears the same. The facts appear to be these [His Lordship then referred to the facts which are stated above, and continued]:—

All these circumstances, and his own honest advice to his client, pointing out the risk and the dangers, and recommending that the transaction should not proceed, prove that he thought that was all which he, as solicitor, was bound to do. He did not think he incurred responsibility by settling the form of the deed, which, after all, did not increase the power of Mr. *Addy*, who was then sole trustee, to commit a breach of trust. We cannot consistently with the evidence, or with justice, or reason, disbelieve Mr. *Duffield*, when he says he never knew nor suspected any dishonest purpose, or believed that any actual fraud would result from what was done; and if that be a true interpretation of the facts, I certainly, for one, am unable to hold him responsible.

With respect to the receipt of the money, he received nothing except two sums, one which belonged to the *Barlow* family, and on which nothing turns, and the other a part of the aggregate trust fund, before division, of which a third came from the *Barnes'* share, representing £65; and it is said he is to be charged with that (though he did not retain or use for his own benefit a single

shilling of that money) because the authority of the trustees to apply that money in the payment of certain costs of a previous suit, which had been compromised, was not obtained from this Court. Now the trustee, Mr. *Addy*, was, as I have said, at that time, beyond question, the legal owner of the fund. He and Mr. *Clark*, the deceased trustee, had a right, by the terms of the will, to be indemnified against all costs properly or reasonably incurred in connection with the trust. These costs had been incurred in a suit brought against them in the name of the present Plaintiffs, the *Barnes* children, by a next friend under the advice of Mr. *Parker*, the family solicitor, which suit, having proceeded to a certain extent, had been compromised on the terms that all three shares of this fund, the *Barlow* share, the *Barnes* share, and the *Addy* share, should bear their proportion of the trustees' costs. The trustee, *Addy*, authorized the sale for that purpose and that application of the money, and it was so applied; and I am most clearly of opinion, first of all, that there is nothing before us to shew that such an application was improper on the part of Mr. *Addy*, the trustee; but, secondly, that if it had been, the solicitor could not possibly have been held on that account responsible. Then it is said that if we do not find these gentlemen answerable for the money, we ought to charge them with costs. I repeat what I said during the argument, that I have been under the impression, and I hope the impression will go abroad, that of late years the Court has set its face against making solicitors or others, who are properly witnesses, and who are not chargeable with any part of the relief prayed, parties to suits with a view of charging them with costs alone. I know no principle on which they can be charged and made parties for that purpose, unless other and further relief might also be given against them. In this case we have held that these gentlemen are not so chargeable; and on all these grounds I am clearly of opinion that the decree of the Vice-Chancellor must be affirmed, and the appeal dismissed with costs.

SIR W. M. JAMES, L.J.:—

I am entirely of the same opinion. I desire to add that I most cordially concur in the general principle with which the Lord Chancellor began his judgment. I have long thought, and more

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than once expressed my opinion from this seat, that this Court has in some cases gone to the very verge of justice in making good to *cestuis que trust* the consequences of the breaches of trust of their trustees at the expense of persons perfectly honest, but who have been, in some more or less degree, injudicious. I do not think it is for the good of *cestuis que trust*, or the good of the world, that those cases should be extended.

With regard to what was said by the Lord Chancellor on the subject of costs, the Vice-Chancellor, in his judgment in the Court below, said that: "With a view to discouraging, as far as possible. suits of this nature against solicitors, I shall dismiss the bill against him also with costs." I entirely concur with his desire to discourage such suits.

SIR G. MELLISH, L.J.:—

I entirely concur.

Solicitor for the Plaintiffs: Mr. *R. A. Westbrook.*
Solicitors for the Defendant *Addy:* Messrs. *Glynes & Son.*
Solicitors for the Defendant *Duffield:* Messrs. *Duffield & Bruty.*
Solicitor for the Defendant *Preston:* Mr. *W. R. Preston.*

In re HOYLAKE RAILWAY COMPANY. *Ex parte* LITTLEDALE.

L. JJ. 1874 Feb. 25.

Contributory—Calls Due—Transfer—Paid-up Shares—Companies Clauses Act, 1845 (8 *Vict. c.* 16), *s.* 16.

If a transfer of shares in a company subject to the *Companies Clauses Act* on which calls are due has been registered, the transfer is not, under the 16th section of the *Companies Clauses Act*, rendered invalid; the former shareholder is not a contributory, and is merely a debtor to the company for the amount of the calls; and the directors may be liable for any loss to the company occasioned by the transfer.

Order of *Malins*, V.C., affirmed.

THE *Hoylake Railway Company* was what is called a contractor's company, that is to say, *Piercy*, the contractor, agreed to buy the land and construct the works, and to be paid partly in money, but chiefly in shares and in debentures considered as fully paid up. The company was incorporated by an Act of Parliament with which the *Companies Clauses Consolidation Act* was incorporated. The works were begun, and there was an account current between Mr. *Piercy* and the company, in which from time to time shares and debentures fully paid up were entered as issued to Mr. *Piercy*. Mr. *Littledale* was the chairman of the board of directors, and he and another director became dissatisfied with the manner in which the business was carried on. An arrangement was accordingly made that they should retire from the direction and transfer their shares to Mr. *Piercy*.

One hundred shares were at this time standing in the name of Mr. *Littledale*, on which £300 was due on account of calls already made, and there was a further liability of £600. These shares were, on the 8th of August, 1866, in pursuance of this arrangement, transferred by Mr. *Littledale* to Mr. *Piercy*. The transfer was registered on the same day, and Mr. *Littledale* ceased to act as a director.

At a meeting of directors held on the 24th of August, 1866, a resolution was passed that the amount required to fully pay up these 100 shares (and also other shares similarly transferred to

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Mr. *Piercy*) be deducted from the sum claimed by Mr. *Piercy* against the company, and that such amount be credited to the said shares. Entries were made in the books crediting Mr. *Littledale* and the other shareholders with the amounts due for the calls, and debiting Mr. *Piercy's* account with an equal sum; and the shares were entered on the register as fully paid up. The register of shareholders was on the table for inspection at every ordinary general meeting of the company; and up to the 30th of August, 1867, the seal of the company was at every ordinary general meeting of the company affixed to the register. The last meeting appeared to have been held in November, 1867, but a winding-up order was not made until 1872, a warrant of abandonment having in the meantime been obtained.

The official liquidator placed Mr. *Littledale* on the list of contributories in respect to these 100 shares. Amongst other things the official liquidator disputed whether anything was properly due to Mr. *Piercy* when the transfer was made.

Mr. *Littledale* applied to have his name removed from the list, and the Vice-Chancellor *Malins* made an order that the name should be removed. His Honour was of opinion that the transfer was irregular, but had been acquiesced in by the directors at the meeting of the 24th of August; and that the time which had elapsed had settled the question.

The official liquidator appealed.

Mr. *Jackson*, Q.C., and Mr. *Westlake*, Q.C., in support of the appeal:—

This was a mere scheme to get rid of troublesome directors, and to get a board of directors to suit Mr. *Piercy*, and as such it cannot stand. Moreover, the transfer is invalid, for no transfer can be made whilst calls are in arrear: *Companies Clauses Consolidation Act*, 8 Vict. c. 16, s. 16. We also deny that the board had any right to treat these shares as fully paid up. Mr. *Piercy* did not complete the line or fulfil his agreements, and was not entitled to be paid.

Mr. *Higgins*, Q.C., and Mr. *Bardswell*, for Mr. *Littledale*, were not called upon.

SIR W. M. JAMES, L.J.:—

I am of opinion that the order of the Vice-Chancellor in this case ought to be affirmed.

Mr. *Littledale* was a shareholder, and he transferred his shares to a Mr. *Piercy*. The transfer was duly registered in the books of the company. Mr. *Piercy*, with respect to some of the shares, as we are told, and I suppose it is a fact, has remained on the register of shareholders; and Mr. *Piercy's* transferees, under certain subsequent transfers, were the registered owners of other of those shares at the time of the winding-up.

Mr. *Littledale*, therefore, was not a shareholder on the register in respect of these shares. Why is he to be put upon it? It is said that he was chairman of the company, and that he transferred those shares by reason of some bargain between him and Mr. *Piercy*, which was not proper as regards the company. That might be the foundation of some application in respect of any loss which had been sustained through a breach of trust; but it cannot make a man who was not a shareholder a shareholder or a contributory in respect of those shares.

It is suggested that Mr. *Littledale* allowed the shares to be transferred while there was in arrear a call of £3 per share due from him in respect of those shares; and it is said that the 16th section of the *Companies Clauses Consolidation Act* provides that a shareholder shall not be entitled to transfer his shares while there is any call in arrear on those shares, or upon any other shares in the company held by him. The very nature of that provision, by the extent to which it is carried, clearly shews that it was intended for the protection of the company, and as a mode by which the company was to have a lien upon all the shares of every shareholder in respect of any calls due from him in respect of any shares whatsoever. It was for the protection of the company, but it is a provision which, if waived by the company, does not make the transfer void. It does not make the shares still remain the shares of the persons who transferred them, or cease to be the shares of the transferee. If there was any breach of duty on the part of a director in respect of that transfer, that breach of duty might be the ground of a special action or suit against him. In this case the breach of duty (if any) was by the directors for the time

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being, who assented to the transfer. It is said on the one side, however, that the shares were really paid-up shares, so that there was no breach of duty at all. On the other side it is said they were not paid up. What appears on the evidence is this: that the transferee, Mr. *Piercy*, had contracted to make the whole line, to buy the land, and to execute the works. He continued to lay out money in executing the works for the company; and immediately after the transfer, in the course of the current account between Mr. *Piercy* and the company, the £300 that was due in respect of those shares was debited to Mr. *Piercy*, on the one hand, as the contractor, and credited to him on the other side in his character of shareholder. So that in the running account between the two parties the calls were entered as actually paid; and if they were not actually paid, there would still be an action against Mr. *Littledale*, because he was the shareholder at the time when the calls were made, and he would still be liable in respect of the calls then due, the non-payment of which was the only thing that could be alleged to be improper, either on the part of himself or the other shareholders. If the calls have not been paid, his liability still continues, but that is not a thing which can be determined in this proceeding, which is to make him a contributory in respect of those shares.

It is said, indeed, that the 200th section of the *Companies Act*, 1862, is applicable to this case. That section enacts that, "In the event of an unregistered company being wound up, every person shall be deemed to be a contributory who is liable at law or in equity to pay or contribute to the payment of any debt or liability of the company." But Mr. *Littledale* was not liable in law or in equity to pay or contribute to any debt of the company. He was merely in the position of a person who might owe money to the company. He could not be made a contributory for that purpose, or for the purpose of adjusting the rights of the contributories among themselves. We cannot make any debtor to a company liable as a contributory, because the money coming from him might be used for the purpose of settling the debts of the company or adjusting the liabilities between the shareholders. He was, to all intents and purposes, in exactly the same position as if his shares had been forfeited; that is, he would be a debtor for the call due at the time, if anything was due.

It is impossible for us in a case of this kind to go into the accounts, which were running on for years before and years afterwards between the contractor, Mr. *Piercy*, and the company, for the purpose of ascertaining whether there was anything due at that time or becoming due afterwards which was properly attributable to the payment of these calls. I should think it exceedingly difficult to make out that anything would be due, having regard to the time at which this was done, or the time these works went on. However, that will be determined if ever the liquidator is advised to try the case of a claim against Mr. *Littledale* as a debtor to the company.

I think the order of the Vice-Chancellor was quite right, and that the appeal ought to be dismissed with costs.

SIR G. MELLISH, L.J. :—

I am of the same opinion. It appears to me that the only real question is whether the 16th section of the *Companies Clauses Consolidation Act* prevented the transfer when registered from passing the property in the shares, and I am of opinion that it did not. It says: "No shareholder shall be entitled to transfer any share after any call shall have been made in respect thereof until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share held by him." Now the mere fact that that section applies not merely to the shares in respect of which the call is made, but to all other shares which the shareholder may hold, seems to me very clearly to shew that the object of the section is merely to give the company a right over the shares. If that were not so, the consequence would be that if when calls are due the company allow either those shares or any other shares belonging to the same shareholder to be transferred, neither the purchaser nor anybody who subsequently purchased from that purchaser would ever become the real holder of the shares.

Then it is said we ought to hold this to be so because the section is for the benefit of the creditors as well as of the company. In the first place I do not think that there is anything in that section which shews the Legislature to have had the rights of creditors in view at the time when they passed it. But if they had those rights in view, I am not at all certain that it would be for

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the creditors' benefit to hold that the transfer was absolutely void. The 36th section of 8 Vict. c. 16, which is the only section giving a right to creditors, provides that if after a creditor has recovered judgment and has issued execution he cannot get satisfied out of the property of the company, then he may have execution against any shareholder. Now it seems quite clear that he cannot have execution against two shareholders as the holders of the same shares. Then, which of the persons is the holder of the shares—the man who has transferred them without having paid a call, or the man who has purchased them and is registered? I do not see why it should not be quite as much, or more, for the benefit of the creditor to go against the purchaser who has purchased and is registered.

It appears to me, therefore, that if the directors assent to a transfer, the property in the shares passes. That being so, whatever other remedies there may be, Mr. *Littledale* cannot be made a contributory. If the creditors or shareholders have any remedy, they may, as has been pointed out, bring an action against him for not having paid the calls which were made at the time when he was a shareholder, and possibly they may have a remedy against all the directors of the company who assented to the transfer being made without the payment of that call.

But it is not necessary now to give any opinion on that subject. This is not an application of that kind. The question before us simply is, whether Mr. *Littledale* ought to be held to be the contributory in respect of these shares. He cannot be so unless he is in point of law the person who ought to be on the register as the holder of the shares, and in my opinion he is not the person who ought to be on the register in respect of them.

The appeal must be dismissed with costs to be paid by the official liquidator.

Solicitors for the Official Liquidator: Messrs. *Ashurst, Morris, & Co.*

Solicitors for Mr. *Littledale:* Messrs. *Chester, Urquhart, & Co.*

In re NEATH AND BRECON RAILWAY COMPANY.

L. JJ.
1874
Jan. 17.

Lands Clauses Act, 1845, *ss.* 80, 85—*Deposit—Costs.*

Where a company has, under sect. 85 of the *Lands Clauses Act*, taken possession of land before agreement, upon giving a bond and depositing money in Court, it is entitled, upon fulfilling the conditions of the bond, to have the money repaid, and the Court cannot, under sect. 80, order payment of costs out of it:—

Per Mellish, L.J.:—Sect. 80 only authorizes the Court to make an order on the company to pay costs, not an order to pay them out of any particular fund.

THIS was an appeal petition from an order of Vice-Chancellor *Bacon.*

In 1864 the *Neath and Brecon Railway Company*, under the powers of an Act with which the *Lands Clauses Act* was incorporated, served upon *John Lloyd Vaughan Watkins* the usual notice to treat for certain lands of which he was in possession. Mr. *Watkins* did not send in particulars of his claim, and the company, being desirous of taking possession, proceeded, under sect. 85 of the Act, and in November, 1865, paid into Court £1544 7*s.* 4*d.*, the sum determined by two surveyors according to the Act, and gave him a bond in the sum of £1544 7*s.* 4*d.*, conditioned as mentioned in that section. In February, 1866, an order was made for investing in consols the sum so paid into Court.

On the 17th of June, 1867, the compensation to be paid by the company was fixed by arbitration at £3400. This sum was paid by the company, and in June, 1873, the property was conveyed to them. They then, in July, 1873, presented their petition, asking that the fund in Court representing the £1544 7*s.* 4*d.* and its accumulations might be sold and the proceeds paid to them. Some of the Respondents, the parties interested in the estate, opposed this petition on the ground that their conveyancing costs had not been paid. It appeared that on the 28th of June, 1873, the common order of course to tax these costs, under sect. 83 of the Act, had been obtained at the Rolls.

By order dated the 27th of November, 1873, Vice-Chancellor *Bacon* directed the fund to be sold, and referred it to the Taxing

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Master to tax the Respondents their costs of the application, including (*sic*) therein all reasonable charges and expenses incident thereto of the purchase or taking of the lands by the company, or which had been incurred in consequence thereof other than such costs as were by the *Lands Clauses Act* otherwise provided for, and of obtaining the order, and all proceedings relating thereto, except such costs (if any) as were occasioned by litigation by adverse claimants; and it was ordered that the costs, when taxed, should be paid out of the proceeds of sale, and the residue of such proceeds paid to the solicitor of the company on their behalf.

The company presented their appeal petition to have this order varied by omitting all the directions relating to costs, and by ordering the whole proceeds of sale to be paid to their solicitors on their behalf.

Mr. *Eddis*, Q.C., and Mr. *Dundas Gardiner*, for the Appellants, referred to *Ex parte Stevens* (1); *Ex parte Flower* (2); *Ex parte Great Northern Railway Company* (3); *Lands Clauses Consolidation Act*, 1845, ss. 80, 82, 83, 85, 87.

Mr. *Kay*, Q.C., and Mr. *Cracknall*, for the principal Respondents, referred to *Ex parte Flower*; *Ex parte Morris* (4); *Ex parte Eastern Counties Railway Company* (5).

Mr. *A. P. Whately*, for other Respondents.

SIR W. M. JAMES, L.J.:—

I am of opinion that this Act is to be construed according to the decision of Lord *Cottenham* in *Ex parte Stevens*. Money deposited under the 85th section is deposited for a particular purpose, and when that purpose has been answered the Legislature says, in so many words, that it is to be paid out to the company. It is urged that the Act only says it shall be lawful for the Court to order it to be paid out. That is the usual courtesy of the Legislature in dealing with the judicature. "It shall be lawful" means, in substance, that it shall not be lawful to do otherwise.

(1) 2 Ph. 772.
(2) Law Rep. 1 Ch. 599.
(3) 5 Ry. Cases, 269, 272; 16 Sim. 169.
(4) Law Rep. 12 Eq. 418.
(5) 5 Ry. Cases, 210.

SIR G. MELLISH, L.J.:—

I am of the same opinion. By sect. 85 the money is deposited in Court to insure the fulfilment of the condition of the bond which is given at the same time. If the Act had stopped there, it would have been a strong thing to say that the money could be applied for any other purpose. But it does not stop there, for sect. 87 says that, upon the condition of the bond being performed, it shall be lawful for the Court to order the money to be repaid to the promoters of the undertaking. That means that the Court shall do so, it being the usual mode of giving a direction to a Court of Justice to say that it shall be lawful for the Court to do the act. This is the same view of the statute as was taken by Lord *Cottenham*. I am not satisfied that any of these costs come within sect. 80, but supposing they do, that section only says that it shall be lawful for the Court to order them to be paid, and I do not think we ought to construe that as meaning that the Court may direct them to be paid out of any particular funds, for particular funds are generally deposited for particular purposes. I think the clause means only that the Court may make an order upon the company to pay them.

Mr. *Kay* asked that the company might be ordered to pay the costs of the Respondents in the Court below. He referred to *Ex parte Stevens* (1).

THE COURT held that as the Respondents had filed an affidavit in opposition to the petition, and increased the expense by their unsuccessful contention, no order ought to be made as to costs.

Solicitors: Messrs. *Dean & Taylor*; Mr. *Greenfield*.

(1) 2 Ph. 772.

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1874
Jan. 22.

In re LIMEHOUSE WORKS COMPANY.

Notice of Appeal Motion—Vacating Inrolment.

Notice of appeal motion was served without any signature, though the name of the solicitors serving it appeared on the back. After some days the solicitor of the Appellant, having discovered the omission, asked the solicitor of the Respondent to allow the error to be corrected. The Respondent's solicitor refused this, and stated that every technical advantage would be taken. The appeal motion was set down, and the Respondent's solicitor informed of it, but no notice of its being set down was regularly served. The Respondent's solicitor, at the earliest possible moment, inrolled the order appealed from:—

Held, that, as distinct notice that no technicality would be waived had been given, the Respondent was entitled to avail himself of the irregularity in the notice of motion and maintain the inrolment, though there had been a correspondence which, standing alone, might have led the Court to vacate it.

THIS was a motion by the official liquidator of the *Limehouse Works Company, Limited*, to vacate the inrolment of an order of the 11th of December, 1873, refusing to put the Respondent *Coates* on the list of contributories.

On the 24th of December, Messrs. *Wood & Hare*, the solicitors of the official liquidator, served on the solicitors of *Coates* a notice of appeal motion for the 14th of January, 1874. This notice was neither dated nor signed, but the name of Messrs. *Wood & Hare* appeared on the back. On the 5th of January a clerk of Messrs. *Wood & Hare* called on Messrs. *Bevan & Whitting*, the solicitors of the Respondent, and requested to be allowed to rectify the omission. Mr. *Whitting* stated to him that he had no authority to allow this to be done, that he should act under the advice of counsel, but, subject thereto, should not be disposed, having regard to the nature of the case, to waive any objection, but should take every technical advantage he possibly could; and on the clerk pressing the point he referred him to *Coates*, who declined to do anything to facilitate an appeal.

On the 6th of January the appeal motion was set down for hearing on the 14th, but no notice of this was served on the Respondent. The Registrar made in the book a note that the

motion was not to come on till the original order had been produced to him. On the 7th a clerk of Messrs. *Bevan & Whitting* was told by a clerk of Messrs. *Wood & Hare* that the appeal motion had been set down, to which he replied that he did not know how that could have been done, as the notice of motion was irregular, and the order had not been produced.

On the 8th of January Messrs. *Wood & Hare* wrote to Messrs. *Bevan & Whitting*: "If you have shorthand writer's note of the judgment herein, we shall be glad to take a copy on the usual terms, at your early convenience." Messrs. *Bevan & Whitting* replied on the same day: "We have succeeded, after great trouble, in obtaining shorthand writer's notes of the Vice-Chancellor's judgment, and shall be glad to supply you with a copy of it on the usual terms of your paying half the shorthand writer's charges, if you will write us to that effect. If you like, we can make, in addition, any number of lithograph copies you may require, charging you half the lithographer's charges, but you must let us know at once if we are to do so." A clerk of *Wood & Hare* then called on *Bevan & Whitting*, and arranged for lithograph copies; and on the 9th of January *Bevan & Whitting* wrote: "We have had Vice-Chancellor *Malins'* judgment lithographed, to save us both expense and trouble, six copies for each of us. Your half share is £2 15*s.* 6*d.*"

On Saturday, the 10th of January, the parties attended before the Registrar to pass the order, and the clerk of Messrs. *Bevan & Whitting* signed it as correct, went away with the understanding that it would be passed at once, and bespoke an office copy for Monday morning. The clerk of Messrs. *Wood & Hare*, it appeared, went away under the erroneous impression that before the order could be passed one of the briefs of Messrs. *Bevan & Whitting's* counsel had to be produced, and the original affidavits; and on the same day, as he was going out of town on Monday, he wrote a note to another clerk of *Wood & Hare*, asking him to get them produced first thing on Monday morning. Just as the latter clerk was leaving Messrs. *Wood & Hare's* office to attend to the business at twelve o'clock on Monday, a note from Messrs. *Bevan & Whitting* arrived, stating that the order had been inrolled that morning.

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The official liquidator now moved to vacate the inrolment on the ground that his solicitors had, by the conduct of Messrs. *Bevan & Whitting*, been misled into believing that they had no intention of inrolling the order so as to prevent an appeal.

Mr. *Glasse*, Q.C., and Mr. *Robinson*, for the motion:—

We submit the notice of motion was sufficient. There is no order directing notices of motion to be signed, for Cons. Ord. ~~III.~~ rule 10, only applies to the case of a pauper, and the statement in *Daniell's* Chancery Practice (1) rests on no authority. The indorsement of the name of the solicitors serves the same purpose as a signature. The Respondents knew that the motion had been set down for hearing, and if there was any irregularity they have by their conduct waived it.

Mr. *Cotton*, Q.C., Mr. *Higgins*, Q.C., and Mr. *Methold*, *contrà*:—

Waiver and bad faith are alike out of the question, for we gave the other side fair notice that we should take every technical advantage. The inrolment was regular, for in the absence of bad faith nothing but the due prosecution of an appeal could stop it. Knowledge that the other side means to appeal is nothing: *Hill* v. *Curtis* (2). Here there was no due prosecution of an appeal. Cons. Ord. XXXI. rule 1: *Groom* v. *Stinton* (3). There was nothing in the correspondence to mislead the Appellants.

Mr. *Glasse*, in reply.

SIR W. M. JAMES, L.J.:—

I am of opinion that, in the circumstances of the case, this motion cannot succeed. Standing by itself, the correspondence would probably have led me to believe that all formalities had been waived, and that the parties were proceeding on the footing that the case was to be decided on the merits. But that correspondence is governed by what had previously taken place. Before it began, an irregularity in the notice of motion of appeal had been discovered. The Appellants asked that it might be waived. The

(1) 5th Ed. 1440. (2) Law Rep. 1 Ch. 425.
(3) 2 Ph. 384.

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solicitor not only refused to waive it, but said in substance: "I can waive nothing in this case without the actual consent of my client." They go to the client, and the client says positively that the irregularity is not to be waived. It was therefore known to the applicants that the question of the sufficiency of the notice was to be raised; that nothing was to be waived, and that the parties were to be at arm's length. It is, therefore, open to the Respondent now to say that there never was any notice of appeal motion such as the Court requires; and that being so, there is no such prosecution of an appeal as can prevent inrolment. The official liquidator might have entered a caveat, and so prevented an inrolment, but he cannot, after distinct notice that every advantage would be taken, be heard to say that the irregularity has been waived, or that he has been misled. The Respondent is entitled to maintain his inrolment, and the motion must be refused with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Wood & Hare;* Messrs. *Bevan & Whitting.*

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L. JJ.
1874
Feb. 25.

[1862 P. 131.]

Inrolment of Decree—Enlarging Time—Cons. Ord. XXIII, *r.* 28.

A Plaintiff, within one month of the end of the five years after a decree had been made, applied to have it inrolled, and obtained an order accordingly. After the expiration of the five years, he discovered that one of the Defendants was dead, and having then revived the suit, he applied to have the decree inrolled.

The application was refused.

ON the 16th of December, 1867, the bill in this suit was dismissed; as reported (1). On the 21st of November, 1872, the Court, on an *ex parte* application by the Plaintiff, ordered the

(1) Law Rep. 3 Ch. 203.

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decree to be inrolled unless cause was shewn against the same within twenty-eight days after service on the Defendants, *Ward* and *Vulliamy*. The notice was served on *Ward* the Defendant, who had been also solicitor for the other Defendant. *Ward* was ill at the time, and it was stated that his clerk, who attended to the business, knew nothing of the previous proceedings. On the 2nd of December *Ward* died. On the 16th of January, 1873, an order for inrolment was made, the executors of *Ward* appearing by counsel. The Plaintiff, on proceeding to get the order drawn up, discovered that the Defendant *Vulliamy* had died in 1870. The Plaintiff thereupon filed a bill of revivor against the executors of *Ward* and the executors of *Vulliamy*. The Defendants demurred, but the demurrer was overruled; and ultimately an order of revivor was made. The Plaintiff now moved, under Cons. Ord. XXIII., rule 28, that the decree might be inrolled, notwithstanding the five years had elapsed.

Mr. *Morgan*, Q.C., for the Plaintiff, said that a case like this, where the Plaintiff wished to proceed, but was prevented by an accident, had the peculiar circumstances mentioned in the General Order. The Plaintiff could not know that *Vulliamy* was dead. *Ward* must have known it, and ought to have told the Plaintiff, who would then have been in time, and would of course have taken the proper steps. He wished to appeal, and was doing his utmost. If this was not a case within the rule, it was difficult to conceive one.

Mr. *Lindley*, Q.C., and Mr. *Bevir*, for the executors of *Ward*; and

Mr. *Phear*, for the executors of *Vulliamy*, were not called upon.

SIR W. M. JAMES, L.J.:—

The Orders of the Court have fixed a time after which a decree shall not be inrolled unless it shall seem to the Lord Chancellor or Lords Justices just and expedient to enlarge the time. In this particular case the five years have long elapsed, both the Defendants are dead, and we are now asked to say that this Plaintiff

should be allowed to inrol the decree. The executors have a right to consider the matter settled, and as the Plaintiff waited until one month only of the five years remained, he is not now entitled to have the time enlarged.

The motion must be refused with costs.

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Solicitor for the Plaintiff: Mr. *E. Randall.*

Solicitors for the Executors of *Ward:* Messrs. *Tamplin, Tayler, & Joseph.*

Solicitors for the Executors of *Vulliamy:* Messrs. *Frere & Co.*

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L. JJ. 1874 *Jan.* 23, 30; *Feb.* 13.

Bankruptcy—Assignment of all Debtor's Property—Previous Agreement to give an Assignment on Demand—Bills of Sale Act—Bankruptcy Act, 1869, *s.* 6.

Two traders, brothers, obtained advances amounting to £500 from their father and brother in various sums, and in 1870, on the last advance of £250 they signed an agreement that they would, on demand, assign the lease of their premises and their business, stock-in-trade, and book debts to the creditors, with a proviso that if they should repay the sums advanced the agreement should be void, but if they should fail to do so a valuation should be made, and the balance, if any, should be paid to the debtors. At the same time the lease was deposited with the same creditors as a security for the due performance of the agreement. In 1873 the debtors became embarrassed, and the creditors demanded the execution of an assignment in pursuance of the agreement, which was accordingly executed, and the balance of the valuation of the property, amounting to £123, was paid to the debtors. The assignment included substantially the whole of the debtors' property, and the creditors took possession of it forthwith. A few days afterwards the debtors filed a petition for liquidation, and the trustee applied to have the deed of assignment of 1873 declared void:—

Held, that the agreement of 1870 became a binding security on demand being made, and that the assignment of 1873, being based upon it, was valid.

THIS was an appeal by the trustee of *William Cook* and *John Cook,* liquidating debtors, from an order of Mr. Registrar *Murray,* sitting as Chief Judge.

In the month of May, 1868, the debtors, who were brothers, purchased from a Mr. *Wilson* the business of a grocer carried on in *West Street, Reading.* On the 8th of November, 1868, their father,

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Aaron Cook, advanced them the sum of £80, and on the 8th of November, 1868, the further sum of £170. On the 11th of July, 1870, *Robert Cook*, a brother of the debtors, advanced them £100, and on the 4th of August, 1870, the further sum of £150.

On the 29th of August, 1870, a written agreement between the debtors and *Aaron Cook* and *Robert Cook* was signed.

The agreement recited that *A. Cook* and *R. Cook* had previously advanced to *W. Cook* and *John Cook* the sum of £500 and upwards, for the purpose of enabling them to carry on their business, at interest at the rate of £6 per cent. per annum, and that *W. Cook* and *J. Cook* required further advances for the purpose aforesaid and to enlarge their trade; and it was thereby agreed that the said *William* and *John Cook* would, on demand, assign the business then carried on by them to the said *Aaron* and *Robert Cook*, together with the lease of the premises occupied by them, and in which the same business was then carried on (which said lease, by way of equitable charge to secure the due observance of that agreement, was then deposited with *Aaron* and *Robert Cook*, or one of them), as also the fixtures, stock, and utensils in trade, together with the book debts, so that the said *Aaron* and *Robert Cook*, or one of them, might be able to carry on the said business either in their name or that of one of them, or in the name of the said *W.* and *J. Cook:* Provided, nevertheless, that if the said *W.* and *J. Cook* should repay the said sum of £500 and interest, and also such further advances as might be made in pursuance of that agreement, with interest at the like rate, the agreement should be void; but should the said *W.* and *J. Cook* be unable or unwilling to repay the amounts aforesaid, then an inventory and valuation of the premises should be taken in such manner as the parties thereto should mutually agree, and in default thereof by valuers on each side, or their umpire, the payment of such purchase-money and valuation, or balance thereof (if any), to be made in the manner agreed on by the parties thereto, or otherwise upon valuation according to the custom of the trade. It was also agreed that *Aaron* and *Robert Cook* should employ, in the conduct and management of the business the said *W.* and *J. Cook*, or one of them, at a salary.

On the 31st of December, 1870, the lease of the premises was

obtained from the landlord, and was deposited by the debtors with their father. *Robert Cook*, shortly after the making of the agreement, entered into the service of his brothers at a salary, and continued in their service until the 5th of April, 1873. In March, 1873, the affairs of the debtors became embarrassed, and some writs were served upon them. *Robert Cook* informed his father that he was afraid executions would be levied upon the goods on the premises. They consulted Mr. *Mortimer*, the family solicitor, and by his advice a demand in writing requiring the debtors to execute an assignment of their property in pursuance of the agreement of the 29th of August, 1870, was served upon them. On the 4th of April, 1873, Mr. *Robert Churchman*, who was the valuer who had valued the stock-in-trade when the debtors purchased it, by the direction of Mr. *Mortimer* made a valuation of the property to be conveyed at the sum of £683 10*s*. The debt and interest then due to *Aaron Cook* and *Robert Cook* amounted to £560. Accordingly, on the 5th of April *Aaron Cook* and *Robert Cook* paid to the debtors, in cash, the balance of £123 10*s*., and by a deed of that date, in consideration of that sum and of the said sum of £560, the debtors assigned to *Aaron Cook* and *Robert Cook* the lease of the premises, and also the fixtures, stock, and utensils in trade and book debts, being in fact the whole of their property with the exception of furniture of the value of £30. *Aaron Cook* and *Robert Cook* afterwards paid the debtors £30 for the furniture.

At the time the deed was executed possession of the premises and of the stock contained therein was given by the debtors to *Aaron* and *Robert Cook*, and shortly afterwards a circular was sent to the wholesale firms who were the principal creditors of the debtors, informing them that the business had been bought by *Aaron* and *Robert Cook*. The debtors disposed of the £123 10*s*. and the £30 by paying two of their creditors, and, on the 16th of April, 1873, presented a petition for liquidation, stating their assets to be *nil* and their debts to be £1833.

With respect to the circumstances under which these advances were made, the result of the evidence was that the sums of £80 and £170 were advanced by *Aaron Cook* on a verbal promise that the debtors should give him a security by deposit of the lease of their

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premises; and that in July, 1870, it was agreed between all parties that *Robert Cook* should advance £250 to his brothers, and that they should give him and *Aaron Cook* a joint security on the lease, and also on the goodwill and stock-in-trade of the business. In pursuance of this agreement they executed the agreement of the 29th of April, 1870.

Under these circumstances the trustee applied to the Registrar, acting as Chief Judge, for an order declaring the deed of the 5th of April, 1873, to be void as against the creditors. The Registrar refused to make the order, and the trustee appealed from his decision.

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the Appellant:—

The assignment of the 5th of April, 1873, which comprised all the debtor's property, was in consideration of a past debt. There was, indeed, a fresh payment of £123, but that is not enough to support the transaction. The Respondents rely on the agreement of the 29th of August, 1870; but that was also in consideration of an antecedent debt. It is true that there is some evidence of a previous verbal promise to give security, but it was only to give some security, without specifying what, which is not sufficient. Again, the agreement was also to give a bill of sale "on demand." If it had any effect at all, it ought to have been registered as a bill of sale; but it was, in truth, only an agreement that if the debtors got into difficulties, they would at the last moment give their creditors a bill of sale, which is a fraudulent agreement: *Ex parte Fisher* (1); *Ex parte Cohen* (2); *Ex parte Pearson* (3).

Mr. *Roxburgh*, Q.C., and Mr. *Colt*, for the creditors:—

The advances were made by both creditors, at all events by *Robert Cook*, on the faith of the deposit of the lease and of a security on the goodwill and fixtures. The agreement of August, 1870, did not operate as an assignment of the chattels when it was executed, but it did as soon as a demand was made. It then became a sufficient agreement to support the assignment of 1873. The agreement was one which could have been enforced in Equity,

(1) Law Rep. 7 Ch. 636. (2) Law Rep. 7 Ch. 20.
(3) Law Rep. 8 Ch. 667.

and the assignment was in strict conformity with it. The Appellant treats the assignment as a security, and the payment of £123 to the debtors as an advance to them. It was, in fact, a sale to the creditors, and the money paid was the cash balance due to debtors. There is no case where a *boná fide* sale, followed by the creditor taking possession, has been set aside: *Hutton* v. *Crutwell* (1); *Lomax* v. *Buxton* (2); *Mercer* v. *Peterson* (3); *Holroyd* v. *Marshall* (4).

Mr. *De Gex*, in reply.

Feb. 13. SIR G. MELLISH, L.J., now delivered the judgment of the Court. After stating the facts of the case, as narrated above, His Lordship continued:—

On the part of the Appellant it was contended that the deed of the 5th of April, 1873, was an act of bankruptcy, as an assignment of all the debtor's property for a past consideration, the £123 10*s.* and the £30 not being, under the circumstances, a substantial exception; and *Ex parte Fisher* (5) was relied on. On the part of the Respondents it was contended that the deed of the 5th of April, 1873, simply carried out the previous agreement of the 29th of August, 1870, which was a valid equitable security, and could not, therefore, be an act of bankruptcy.

I will, therefore, first consider what was the effect of the agreement of the 29th of August, 1870. Now by that agreement the debtors agree, on demand, to assign to *Aaron Cook* and *Robert Cook* the property mentioned in the agreement, and we are of opinion that until demand no right to the property agreed to be assigned, with the exception of the lease which was deposited, would pass either at law or in equity. We think that it was intended that until demand the debtors should have the power of dealing with their property in any way they pleased; when, however, a demand of an assignment was once made, we think that a right in equity to the property agreed to be assigned as a security

(1) 1 E. & B. 15. 17 Jur 392.
(2) Law Rep. 6 C. P. 107.
(3) Law Rep. 3 Ex. 104.
(4) 10 H. L. C. 191. 10 Jur N.S. 213
(5) Law Rep. 7 Ch. 636.

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for the £500 and interest immediately accrued. It was objected that the agreement was an agreement for a sale at a valuation to be made by a valuer to be agreed upon, and that a Court of Equity has no means of granting specific performance of such an agreement. We are of opinion, however, that the substance of the agreement is, that the Respondents should have a security on the property of their debtors for a debt, and that the valuation is merely a mode of carrying that security into effect. In an ordinary mortgage there is a power of sale, and after satisfying debt, interest, and costs by the sale, the mortgagee is to pay the surplus to the mortgagor. By this agreement the creditor, instead of selling the property, is to have it valued, and to pay any surplus, after satisfying the debt and interest, to the debtors. Assuming that a Court of Equity could not carry out this part of the agreement if the parties did not agree about it, that ought not to affect the security of the creditors on the property of their debtors, which was the main object of the agreement. We are of opinion, therefore, that the agreement was, after demand, a valid equitable security upon the property of the debtors, unless it was rendered invalid either by the *Bankruptcy Act* or the *Bills of Sale Act.* Now the *Bankruptcy Act* could not affect the validity of the agreement unless we hold that the agreement itself, either immediately it was executed or when the demand was made, was in substance an assignment of all the debtor's property for a past consideration. It is therefore necessary to consider whether the agreement of August, 1870, was itself given as a security for a past debt, or was given, on the whole or in part, for a *bonâ fide* substantial advance made at the time.

Aaron Cook, in his affidavit, says that before he advanced the £250 his sons agreed to assign to him, by way of mortgage, not only the lease of their premises, but also the goodwill and stock-in-trade of their business. His sons however, the debtors, do not support this statement, but only mention the lease as the security on which the money was advanced, and we are of opinion there is no sufficient evidence of any agreement to give the father a security on the debtor's stock-in-trade, fixtures, and book debts before his money was advanced. With respect, however, to the £250 advanced by *Robert Cook*, not only the father and *Robert*, but the

debtors also, state that the security was in substance agreed upon before the money was advanced; and as the agreement of the 29th of August, 1870, was actually signed a few weeks afterwards, and as *Robert*, a young man just of age, could not have been expected, and indeed ought not to have been asked, to advance a sum of money of great importance to him to his brothers without all the security he could get, we think that his £250 ought to be treated as a *bonâ fide* substantial advance made on the security of the agreement of the 29th of August, 1870. Then with respect to the *Bills of Sale Act*, it is unnecessary to determine whether, as far as respects the goods and chattels and fixtures comprised in it, the agreement was a bill of sale within the Act (though I incline to think that it was), because at the time the petition for liquidation was presented the goods, chattels, and fixtures were not in the possession or the apparent possession of the debtors. We are of opinion, therefore, that the agreement of the 29th of August, 1870, gave the Respondents a good equitable security upon all the property of the debtors which was included in the assignment of the 5th of April, 1873; and, having come to this conclusion, we think it is impossible to hold that the assignment of the 5th of April, 1873, was itself fraudulent or an act of bankruptcy. If that assignment had never been executed, and all that had taken place on the 5th of April had been that the Respondents had paid the debtors the £123 10*s.*, and the debtors had given possession to the Respondents of the premises, stock-in-trade, and fixtures, the title of the Respondents to the property under the agreement of the 29th of August, 1870, would, in our opinion, have been good. The only effect of the assignment was that it conveyed to the Respondents the legal estate in the leasehold premises and furnished a record of the completion of the transaction. The beneficial interest was already in the Respondents. Neither was the assignment of the 5th of April, 1873, executed for the purpose of evading the *Bills of Sale Act* and curing the defect caused by the non-registration of the agreement of the 29th of August, 1870, because possession of the property conveyed was given at the same time the deed was executed, which alone would have prevented the operation of the *Bills of Sale Act;* and this distinguishes the present case from

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Ex parte Cohen (1). On the whole, we are of opinion that the judgment of the Registrar ought to be affirmed, but as the circumstances of the case were very suspicious, and the creditors were entitled to have them fully inquired into, and there is, as we were informed, absolutely no estate at all out of which to pay costs, we think that there should be no order as to the costs of the appeal, and that the deposit should be returned.

Solicitors for the Appellant: Messrs. *Weeks & Son.*
Solicitor for the Respondents: Mr. *T. H. Mortimore.*

(1) Law Rep. 7 Ch. 20.

WILSON *v.* NORTHAMPTON AND BANBURY JUNCTION RAILWAY COMPANY.

L. C. and L. JJ.
1874
Feb. 19.

[1871 W. 146.]

Specific Performance—Erection of Works—Damages.

A railway company agreed for valuable consideration with a landowner to erect, construct, and fit up a station on certain lands which they had bought from him. The agreement contained no further description of the station, nor any stipulations as to the use of it. The company having refused to erect a station in the specified place, and substituted one at a distance of two miles:—

Held (affirming the decision of *Bacon*, V.C.), that the case was one in which justice could be better done by an inquiry as to damages than by a decree for specific performance.

THIS was an appeal by the Plaintiff from a decree of Vice-Chancellor *Bacon* directing an inquiry as to damages in lieu of specific performance.

The suit was for specific performance of an agreement by which the promoters of the *Northampton and Banbury Junction Railway Company*, in consideration of the withdrawal of the Plaintiff's opposition to their bill then pending before Parliament, agreed to erect a station and works upon the Plaintiff's land.

In 1863 a bill was introduced into Parliament for the incorporation of a company for the purpose of constructing a railway from *Banbury* to *Northampton*. The proposed line passed through a freehold estate of 326 acres which Plaintiff was then under contract to purchase, and, believing that the railway would ruin the estate as a residential property, Plaintiff petitioned the House of Lords against the bill. Negotiations took place between the promoters and Plaintiff, for the purpose of inducing him to withdraw his opposition to the bill, which negotiations resulted in an agreement, dated the 6th of June, 1863, between the promoters and the Plaintiff, by which it was provided among other things:

1. "That in consideration of the said *F. P. Wilson* withdrawing all opposition to the said bill and the same passing into law, the said company incorporated shall, at their own cost, in a good,

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substantial, and workmanlike manner, erect, fit up, and construct the station, arches, crossings, and other works specified in the schedule thereof hereunder written."

The schedule, so far as related to the station, was in the following words:

"A station to be made on Nos. 24, 25, and 26, parish of *Wappenham*, or some part or parts thereof."

In pursuance of the agreement Plaintiff withdrew his petition, and the bill passed into an Act, by which the company were incorporated as the *Northampton and Banbury Junction Railway Company.*

The company adopted the agreement, and in pursuance of its provisions served notice to treat for parts of the Plaintiff's lands, including the parcels referred to in the schedule as 24, 25, and 26. Proceedings were taken in manner provided by the agreement for determining the compensation, and in March, 1865, an annual rent-charge of £55 was awarded by Plaintiff's surveyor as compensation for the land of the Plaintiff taken by the company, and damage and injury sustained.

The company took possession of the Plaintiff's land, but the line was not proceeded with for some time. Early in 1871 the company, finding it more convenient to change the site of the proposed station and to erect it at a distance of two miles from the Plaintiff's property, endeavoured to induce him to give up his right to have the station built upon his land in consideration of compensation to be made to him by the company. The Plaintiff, by his solicitors, wrote that he would consent to the proposed change of site provided he was secured an annual rent-charge of £100 in addition to the £55 under the agreement and award of his surveyor. The Defendants declined to accept this offer, and had commenced erecting their station at a distance of two miles from the land of the Plaintiff. Under these circumstances the Plaintiff filed his bill, praying that the agreement of the 6th of June, 1863, might be specifically performed by the Defendants, having regard to the award made by his surveyor, and that for this purpose all necessary inquiries might be made and directions given.

The Defendants, by their answer, admitted themselves to be

bound by the agreement of June, 1863, but declined to build a station on the Plaintiff's land as contemplated by that agreement, and they insisted that no decree for specific performance of the agreement, so far as regarded the erection of the station, could properly be made. They also insisted that the station now being erected would not only be far more convenient to the public than the one which the Plaintiff insisted ought to be erected, but would still be required for the accommodation of the public even if the Plaintiff succeeded in his present contention.

Evidence was adduced by Defendants in support of this allegation, shewing the advantage to the public and general traffic arrangements of the station actually constructed; the disadvantages from the same point of view, and engineering difficulties of a station at the point insisted on by the Plaintiff, and the small amount of inconvenience and damage to the Plaintiff by the departure from the terms of the agreement.

Evidence in opposition was adduced by the Plaintiff, especially as to the great increase of value to his estate for building purposes, and conveyance of produce from the station on his own land, and the absence of any engineering difficulties which might not readily be overcome.

Vice-Chancellor *Bacon* held that he had jurisdiction to decree the erection of a station, but that an inquiry as to damages would do better justice in the case of so vague an agreement, and His Honour accordingly directed such an inquiry (1). The Plaintiff appealed.

(1) 187$\frac{4}{5}$ Jan. 24. WN(1874)20

SIR JAMES BACON, V.C.:—

A more unsatisfactory case than the present, in one point of view, I have never had to deal with. An agreement sufficiently plain in its terms, at least, to express what the intention of the parties was, is stated on the bill. It is admitted by the Defendants, who state in Court without hesitation or equivocation that they are bound to perform their just contract with Plaintiff, but that they decline to do so. A more unblushing avowal of a dishonest intention I have never heard. No excuse is offered for it but that they have changed their minds, and they rely upon the cases which have been referred to, and the principle of the Court, that this Court cannot decree specific performance of an agreement which is only to erect a building. I am far from adopting that as a conclusive statement of the law. I am not aware that the Court has so decided in that unqualified manner, and I should require very distinct authority before I said that the Court had no jurisdiction to compel the erection of buildings. But in this case,

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Mr. *Eddis*, Q.C., and Mr. *D. Jones*, for the Appellant:—

The Court has jurisdiction to enforce specific performance of this agreement, on the faith of which Plaintiff was induced to

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considering the length of time which has elapsed, and the other circumstances attending the case, I am obliged to exercise that discretion which is given to me by the statute (21 & 22 Vict. c. 27) which has been referred to.

It is a matter left to me to say whether I will direct the building of the station, or whether I will direct compensation to be made to Plaintiff for the failure in building that station. Without the least disposition not to enforce to the utmost of my power the contract which the Defendants have entered into, I believe, in my discretion, that it is more to the advantage of Plaintiff, and more to the advantage of public justice, that I should direct an inquiry as to compensation, than that I should make a decree for specific performance. The inquiry, in my opinion, may be carried on with perfect satisfaction. The Plaintiff's allegation is, that his motive in agreeing to take this station was that the value of the land not taken by the railway company would be increased by its being capable of being adapted for building purposes. That is an element in his case, and will be entitled to consideration whenever the damages are assessed. Although I do not by any means intend to hold Plaintiff to the offer which he made to take £100 a year rent-charge as the measure of his damages, it is not without its weight when I am called upon to exercise my discretion. Another reason is, that if I were to direct the erection of a station, I must specify either now, or it must be specified by means of an inquiry in Chambers, what is meant by a station, what kind of station it is to be, upon what architectural specification it is to be constructed, with what materials and under what regulations; all of which things I have no means at present of ascertaining, and which, if they could be ascertained at all, could only be ascertained after long delay, at considerable expense, and with a most uncertain result at the end of it. The Plaintiff, unfortunately, has entered into an agreement so vague in its terms that I cannot direct the present specific performance of it. It is only that a station shall be made on three parcels of land which are mentioned in the schedule, or some parts thereof; upon what part of the land it was to be made being left wholly undetermined and vague. If I were to direct specific performance, I could only do it in the terms of the stipulation in the agreement, and the enforcing of those stipulations would be a matter that I should find great difficulty in, and which I could never dispose of satisfactorily to myself, nor, as I believe, to the advantage of the Plaintiff. A station is described by the *Railways Clauses Act* (8 Vict. c. 20), by which Act (sect. 45) the company are authorized to purchase land for the purpose of making and providing additional stations for the accommodation of passengers, and for receiving, depositing, loading and unloading goods or cattle to be conveyed upon the railway. In directing an inquiry, therefore, as to the damage which has been sustained, it will be for not building such a station as is mentioned in the Act of Parliament. That will enable the Chief Clerk to do what is right, and he will know what he has to deal with when he is dealing with a station. The other circumstances which

withdraw his opposition to the Defendants' bill before Parliament, and part with his land at a price which was subject to the agreement; and will not leave Plaintiff to his remedy in damages, which will afford him no adequate compensation. The mere convenience or inconvenience to the public of the particular station cannot be set up by the company as a reason for not performing their agreement: *Lloyd* v. *London, Chatham, and Dover Railway Company* (1), *Raphael* v. *Thames Valley Railway Company* (2). It will be contended that, as there are difficulties in the way of executing the agreement, the Court ought not to decree specific performance; but, rather than allow a company to turn round and repudiate an agreement of which they have got the full benefit, the Court will struggle with any amount of difficulties to compel them to perform it *in specie*: *Wilson* v. *Furness Railway Company* (3); *Sanderson* v. *Cockermouth Railway Company* (4); *Storer* v. *Great Western Railway Company* (5). There is no such difficulty in carrying out this agreement as to induce the Court to decline exercising jurisdiction. If the parties differ as to the mode in which the stipulated works are to be executed, a reference will be directed to Chambers, as in *Lytton* v. *Great Northern Railway*

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are alleged in the bill will also be taken into consideration.

I believe that I should be doing the Plaintiff an injury and an injustice if I decreed simply specific performance of the agreement when I have another and a better opportunity of doing him justice, which it is my desire to do, as I have no wish whatever to let the Defendants off the performance of the contract which they have entered into, by directing that the damage which he has sustained by the non-performance of this contract shall be ascertained in Chambers, and the amount of it paid by the Defendants.

I confess that I should have been better pleased if I could have seen my way to decree the erection of such a station, as I have the power of enforcing the erection of, by the Defendants at the proper time and in the proper place.

Mr. *Eddis* offered, on behalf of the Plaintiff, to take a third-class station, waiving any question as to damages, so as to enable the Court to perform the contract.

The offer not being accepted by the Defendants, the order was for an inquiry as to the damage sustained by the Plaintiff in consequence of the non-completion of the contract mentioned in the bill.

(1) 2 D. J. & S. 568. 11 Jur NS. 380
(2) Law Rep. 2 Ch. 147.
(3) Ibid. 9 Eq. 28.
(4) 11 Beav. 497.
(5) 2 Y. & C. Ch. 48.

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Company (1), where specific performance was decreed of an agreement by a railway company to construct a siding and approaches thereto; *Hood* v. *North-Eastern Railway Company* (2), where, notwithstanding a difficulty from the use of the term "first class station," it was referred to Chambers "to inquire what rooms and conveniences ought to be supplied and used for the reasonable accommodation of the station at *C.* as a first class station;" and the company were ordered to supply such rooms and conveniences accordingly.

Mr. *Kay*, Q.C. (Mr. *Kekewich* with him), for the company, was directed to confine himself to the question of the costs of the appeal.

LORD SELBORNE, L.C.:—

The principle which is material to be considered in the present case is, that the Court gives specific performance instead of damages, only when it can by that means do more perfect and complete justice. An agreement, which is not so specific in its terms or in its nature as to make it certain that better justice will be done by attempting specifically to perform it than by leaving the parties to their remedy in damages, is not one which the Court will specifically perform.

Now, in this particular case, the only words expressing with certainty anything with which we have to deal, are the words of the engagement adopted by the company, that they will "at their own cost, in a good, substantial, and workmanlike manner, erect, set up, and construct a station to be made on Nos. 24, 25, and 26, in the parish of *Wappenham*, or some part or parts thereof." If it had been the intention of the parties to exclude any contract as to the use of the station when erected, they could hardly have adopted better words for that purpose; for every word expressing what they are to do is applicable to the making of the station, and not to the using of it.

It is suggested that an agreement to use the station must be implied, for that it could only have been intended to be erected with

(1) 2 K. & J. 394. 2 Jur NS 436 (2) Law Rep. 8 Eq. 666; Ibid. 5 Ch. 525.

a view to use. That the company were expected to use it is very probable, but it is not so expressed; and the Court, if it attempted to impose on the company anything like a definite obligation as to the use of the station, would not be executing the written agreement, but enlarging it. If the use can only be collected by implication, then in that respect the agreement is vague and indefinite. It is definite and not vague only as to erecting, setting up, and constructing something capable of being erected, set up, and constructed; but there is no other definition of what that thing is than that which is involved in the necessary meaning of the words "a station." I apprehend that that expression is definite to this extent—it means a stopping-place on the line of railway, that is, a place at which traffic of some description may in a reasonable manner be taken up and set down by and from the carriages moving upon the line. To that extent it is definite and not vague, but the moment you suggest any considerations as to the nature and degree of the convenience and accommodation intended by the parties, then it is wholly vague and indefinite, and there are no elements which can enable the Court, adhering simply to the agreement, and not going beyond it, to determine how those uncertainties are to be reduced to certainties.

The Vice-Chancellor has thought that, under those circumstances, although the case is, in one sense, a strong one, being a case in which the company say distinctly, "We admit ourselves to be bound by this agreement, but we refuse to perform it," still it is a case in which the Court cannot satisfactorily do justice by means of a decree for specific performance, and the best justice of which the case is capable will be done by giving damages.

It has been a matter of some surprise to us that the Plaintiff should have been dissatisfied with that conclusion; for if the view which has been already expressed is correct, supposing the Court had given him specific performance, it could not have extended the express obligation of the company, and therefore could only have given him the very minimum of that which is expressed in the terms creating the obligation; whereas, in the case of damages, as it appears to me, the Plaintiff will be entitled to the benefit of such presumptions as, according to the rules of law, are made in

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Courts both of Law and Equity against persons who are wrong-doers in the sense of refusing to perform, and not performing, their agreements. We know it to be an established maxim, that in assessing damages every reasonable presumption may be made as to the benefit which the other parties might have obtained by the *bonâ fide* performance of the agreement. On the same principle, no doubt, in the celebrated case of the diamond which had disappeared from its setting and was not forthcoming, a great Judge directed the jury to presume that the cavity had contained the most valuable stone which could possibly have been put there. I do not say that that analogy is to be followed here to the letter; the principle is to be reasonably applied according to the circumstances of each case. So applying it to the circumstances of the present case, it appears to me that a jury might with perfect propriety take into account the probable benefit which the Plaintiff's estate might have derived from the existence of a stopping-place on the line to which traffic might have been attracted, or which might have been convenient to the persons resident upon that estate. They might take into account the reasonable probability, that if the company had *bonâ fide* performed the agreement, they would have made the station in a reasonable manner as regards the mode of construction and the extent of accommodation; and they might also take into account the reasonable probability, that if the company had made the station, they would, in their own interest, have thought it worth while to make a reasonable use of it. All those are elements, no doubt, more or less of an indefinite character, but proper for the consideration of a jury on the question of damages, and proper for the consideration of this Court when it discharges the functions of a jury.

It appears to me, therefore, that substantial justice may in that way be done between the parties; but I do not see how it could possibly be done by way of specific performance.

Looking at the attitude assumed by the Defendants, although we cannot but think the Plaintiff would have been better advised if he had been content with the decree which he obtained, yet we think ourselves justified in marking our disapprobation of the conduct of the Defendants in refusing to perform their agreement,

by declining to give them the costs of the appeal. The appeal will, therefore, be dismissed without costs.

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SIR W. M. JAMES, L.J.:—I quite agree.

SIR G. MELLISH, L.J.:—I agree.

Solicitors: Messrs. *Johnstone, Farquhar, & Leech;* Messrs. *Birchams.*

LYALL *v.* WELDHEN.

L. C. and L. JJ. 1874 *Feb.* 11.

[1874 L. 6.]

Practice—Transfer of Cause—Costs.

As a general rule a suit instituted in one branch of the Court when a suit as to the same matter is pending in another branch will be transferred to the latter, and the Plaintiff in the second suit will have to pay the costs of the transfer. But the Plaintiff in the first suit ought, before giving notice of motion for transfer, to ask the Plaintiff in the second suit for his consent to the application; and if the Plaintiff in the first suit neglects to do so he may have to pay the costs of the application.

A BILL of *Weldhen* v. *Bayley* was filed on the 5th of December, 1873, in the Court of the Vice-Chancellor *Hall*, by *T. Weldhen* and *J. Fluker*, against *M. Bayley*, *F. S. Bayley*, and *E. H. W. Swete*, and prayed for partition of an estate at *Shorne*. A bill of *Lyall* v. *Weldhen* was filed on the 17th of January, 1874, in the Court of the Master of the Rolls, by *J. B. Lyall*, against *T. Weldhen*, *J. Fluker*, and *M. L. Dickinson*, and also prayed for a partition of the estate at *Shorne*. This bill stated an indenture, dated the 13th of June, 1873, under which the interest of the three Defendants to the first suit became vested in the Plaintiff and in *Dickinson*, a Defendant to the second suit. The Plaintiffs in the first suit then amended their bill accordingly, and on the 31st of January, 1874, gave notice that they should, by special leave, move to have the second suit transferred to the Court of the Vice-Chancellor *Hall*, and that the Plaintiff in the second suit should pay the costs of the application and consequent thereon. The solicitors of the Plaintiff in the second suit thereupon wrote to the solicitors of the Plaintiffs in the first suit, stating that the first suit was not an effective suit, and

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that the second suit was more convenient; but offering to consent to the transfer if the costs of the motion to transfer were made costs in the cause. To this the Plaintiffs in the first suit would not agree, and they now brought on the motion.

Mr. *Greene*, Q.C., and Mr. *Methold*, in support of the motion:—

If the Defendants in the first suit had really no interest, the Plaintiffs were misled in that respect by certain statements previously made by the Plaintiff in the second suit. His solicitors were perfectly well aware of the existence of the first suit, and the second bill ought to have been filed in the same Court. The Plaintiff in the second suit has chosen, for no reason, to file a bill in another Court, and must pay the costs of the transfer: *Lucas* v. *Siggers* (1); *Sayers* v. *Corrie* (2).

Mr. *Nalder*, for the Plaintiff in the second suit:—

We do not object to the transfer, but only to payment of the costs. The first suit was absolutely useless until the bill was amended, and there was no reason why an effective bill should not be filed in the Court of the Master of the Rolls, where a decree could be more speedily obtained. At all events the Plaintiffs in the first suit ought to have consented to our proposal, and have made the small costs of the transfer costs in the cause. They never applied to us to consent to a transfer, but proceeded, as soon as they had amended their bill, to serve the notice of motion.

Mr. *Greene*, in reply:—

In none of the cases has it been laid down or intimated that a request to consent to the transfer must first be made.

LORD SELBORNE, L.C.:—

There is no general order which, as a matter of law, takes away from a Plaintiff the right to select a particular Court without regard to the existence of a previous suit in another Court; and there may be cases in which such a proceeding is proper and reasonable. But this Court has generally acted on the principle

(1) Law Rep. 7 Ch. 517.

(2) Law Rep. 9 Ch. 52. The reporter is informed that in this case an application to consent to the transfer was made and refused before the notice of motion was given.

that if a suitor insists on proceeding in another Court, when a suit relating to the same matter is already in existence, he must expect to have to pay the costs of the transfer, if a transfer is ordered against his will.

We think that this is a case in which the transfer ought to be made, and if the Respondent had come here to oppose the transfer we might have ordered him to pay the costs. But no authority has been cited for making him pay the costs in a case of this description.

The proper course is for the party who desires the transfer to apply to the party who has filed the second bill, and ask for his consent to the transfer; and if that course had in this case been followed, that consent would, as far as we can judge, have been given. But notice of a motion for transfer was first sent, which was met by a letter offering to consent to the transfer if the costs of the application were made costs in the cause. That offer was refused, and from that moment the party refusing the offer was in the wrong.

The transfer must be made; the costs up to the date of the letter will be costs in the cause, and the party making this application must pay the subsequent costs.

SIR W. M. JAMES, L.J., and SIR G. MELLISH, L.J., concurred.

Solicitor for *Weldhen* and *Fluker*: Mr. *H. Fluker*.
Solicitors for *Lyall*: Messrs. *Wood, Street, & Hayter*.

L. C.
and L. JJ.

1873
Dec. 19.

1874
Jan. 16.

2 Ch D. 324
4 C.L.D. 295.
16 C.L.D. 628-9
634

Ex parte LINSLEY. *In re* HARPER.

Bankruptcy—Resolution for Composition—Assets exceeding Liabilities—Motive of Kindness towards Debtor—Dissentient Creditors—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 126, 127.

The statement of the debts and assets of a liquidating debtor shewed that his assets covered his liabilities, but his principal assets consisted of houses which were heavily mortgaged. The majority of creditors passed a resolution to accept a composition of 10*s.* in the pound. A dissentient creditor applied to set aside all the proceedings, producing evidence that the debtor had undervalued his property. The debtor filed an affidavit stating that his creditors accepted the composition with a full knowledge of the state of his property, and from a desire to assist him and prevent his being completely ruined, and also to avoid waiting for the realization of the property, which would have taken a considerable time:—

Held (affirming the decision of *Bacon*, C.J.), that as the dissentient creditor, as well as the others, knew that the assets exceeded the liabilities, there was no ground for setting aside the proceedings.

THIS was an appeal from a decision of Sir *J. Bacon*, the Chief Judge in Bankruptcy.

On the 4th of February, 1873, *William Harper*, a builder at *Hull*, filed a liquidation petition in the County Court at *Hull*. In the statement of his debts and assets the Form B. prescribed by the *Bankruptcy Rules*, 1870, being the "List of creditors fully secured," was filled up thus: Amount of debts, £2150; estimated value of securities (which consisted of houses in *Hull*), £2150.

The Form G., being the "Full statement of his property," was filled up with a list of the same houses as were included in Form B., and which were stated as estimated to produce £2,600. His personal property was stated to be worth £44 10*s.* It thus appeared that there was a surplus of £494 10*s.* available for payment of his unsecured creditors, whose debts were set down as £438 18*s.*

At the first meeting of the creditors it was resolved by the proper statutory majority to accept a composition of 10*s.* in the pound, of which 7*s.* 6*d.* was to be paid immediately, and the remaining 2*s.* 6*d.* was to be paid in six months, and secured by promissory notes. This resolution was duly confirmed at the second meeting of the creditors, and was registered. On the 14th

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of March the first instalment of the composition, and the promissory notes for the second instalment, were tendered to all the creditors, and they all accepted them except *G. H. Linsley*, who had dissented from the resolution, and who refused to accept the composition. On the 20th of March the creditors granted *Harper* an order of discharge. On the 30th of May *Linsley* applied to the Court to rescind all the orders theretofore made by the Court in the matter, and to annul the certificate of discharge granted to the debtor, on the ground that at the time of the filing of the petition, and at the registration of the order of discharge, the debtor was able to pay all his creditors in full.

In support of this application affidavits were made by two experienced local valuers, who stated that, in their opinion, the debtor's real estate would sell by public auction for £3400. A Mr. *Grantham* also made an affidavit, in which he said that he was willing to buy the property for £2700. *Harper* himself made an affidavit, in which he said: "The creditors attending the meetings were aware of the estimated value of my real properties, and accepted the composition of 7*s.* 6*d.* in the pound down, and my promissory notes for 2*s.* 6*d.* in the pound at six months, with a full knowledge of all the facts of the case, and from a desire to assist me and prevent my being completely ruined, and also in order to receive down a much larger sum than they would otherwise have got, without waiting for a considerable time until my different properties could be realized, which payment down I was enabled to make through the assistance of a friend."

The application was refused by the Judge of the County Court; and his decision was affirmed by the Chief Judge on appeal. *Linsley* again appealed from the Chief Judge.

After the opening of the appeal the case stood over for fresh evidence on the question whether the Form G. prescribed by the *Bankruptcy Rules*, 1870, was filled up and produced at the meeting of creditors. Five of the creditors present, who composed the majority who signed the resolution, filed an affidavit, in which they swore that at both the meetings of the 5th and 13th of March the Form G. was produced and read over before the resolution was passed. The debtor also filed an affidavit to the same effect.

On the other hand, Mr. *J. H. B. Chambers*, a solicitor, stated

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that he was also present on the 5th of March, and that the Form G. was not produced although he asked for it, and that he asked the debtor what the value of his real property was, but he gave him no answer, and *Linsley* confirmed his evidence.

Mr. *Yate Lee*, for the Appellant:—

It is clear from the evidence that the mortgaged property was worth considerably more than the debtor's estimate. But even according to his estimate there was a surplus enough to pay the unsecured creditors in full, and his affidavit shews that the majority of the creditors agreed to accept the composition mainly from motives of kindness to him. In order to bind dissentient creditors the resolution must be a fair bargain with the debtor, not a mere act of benevolence, just as in the case of a deed under the *Bankruptcy Act*, 1861: *Ex parte Williams* (1); *Ex parte Cowen* (2); *Hart* v. *Smith* (3). But it also appears by the evidence of some of those present that the Form G. was not filled up and produced at the first meeting, and that they were in fact deceived as to the amount of the debtor's assets.

Mr. *De Gex*, Q.C., and Mr. *Bagley*, for the debtor, were not called on.

LORD SELBORNE, L.C.:—

I think that no sufficient reason has been shewn for disturbing the conclusion of the Chief Judge. The only doubt which I felt from the commencement of the argument arose from the unsatisfactory way in which the documents produced at the meeting were filled up. But all parties present at the meeting admit that they had full information as to the real value of the property. The debtor's witnesses say that the statement G. was produced at the meeting; and the Appellant, while he denies that that document was produced, admits that he was acquainted with the value of the property. I therefore come to the conclusion that there was no intention on the part of the debtor to deceive his creditors, and that they were not deceived. The appeal must be dismissed with costs.

(1) Law Rep. 10 Eq. 57. (2) Law Rep. 2 Ch. 563.
(3) Law Rep. 4 Q. B. 61.

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SIR G. MELLISH, L.J.:—

I am of the same opinion. When the Judges of two Courts have agreed that there was no fraud in a transaction, this Court ought not to come to a different conclusion except on very strong grounds. Looking at the nature of the debtor's property, the difficulty of its realization, and the expense of proceedings in bankruptcy, I think the creditors had good reason for accepting a composition of 10*s.* in the pound instead of making the debtor a bankrupt.

SIR W. M. JAMES, L.J., concurred.

Solicitor for the Appellant: Mr. *J. L. Morris*, agent for Mr. *T. Spurr, Hull.*

Solicitors for the Debtor: Messrs. *Frankish & Buchanan*, agents for Mr. *S. C. Frankish, Hull.*

Ex parte BARNETT. *In re* DEVEZE.

L. C. and L. JJ. 1874 *Jan.* 16.

Bankruptcy—Mutual Credits—Set-off—Secured Debt—Bankruptcy Act, 1869, s. 39.

B. & Co. had business transactions with a trader who became bankrupt, and at the time of the bankruptcy the bankrupt owed *B. & Co.* £3010, and *B. & Co.* owed the bankrupt £88; but the bankrupt held goods of *B. & Co.* upon which he had a lien for that amount. The trustee in the bankruptcy insisted that *B. & Co.* should pay the debt of £88 before the goods were delivered up to them, and that they should prove for the whole sum of £3010 against the bankrupt's estate:—

Held (reversing the decision of the Registrar), that *B. & Co.* were entitled to have the sum of £88 set off against their claim, so as to free the goods from the lien, and to prove for the balance against the bankrupt's estate.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

Mr. *J. L. Deveze*, the liquidating debtor, was a general merchant carrying on business in *London* and *Lyons* under the firm of *Heitz & Deveze.*

In August, 1872, Messrs. *G. Barnett & Co.*, merchants at *London* and *Shanghai*, purchased on behalf of *Deveze* a number of bales of

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silk, for which they drew on him bills of exchange payable at six months' sight.

On the 17th of January, 1873, *Deveze* filed a petition for liquidation, and a trustee was appointed.

In consequence of the liquidation the bills of exchange were dishonoured, and *Barnett & Co.* took up the bills, and obtained possession of the bills of lading of the silk, which they afterwards sold. There remained, however, on account of this transaction, a balance due to *Barnett & Co.* of £3010.

Previously to the liquidation *Barnett & Co.* also consigned to *Deveze* certain other bales of silk to be sold at *Lyons* on their own account. They drew bills on him on account of this consignment, and the bills were discounted by the *Lyons* Bank, who took the bills of lading of the silk. In order to sell the silk *Deveze*, according to the usual practice, applied for samples of the silk, for which he paid cash to the bank, and some of which he had in his possession at the time of the liquidation. The trustee in the liquidation claimed to hold these samples of silk as security for the money paid for them, amounting to £88, until that sum was paid in full.

On the other hand, *Barnett & Co.* claimed to have that sum set off against the debt of £3010 due to them, and to prove for the difference, namely, the sum of £2922, against the estate of *Deveze*. The Registrar decided that there was no right of set-off, and that *Barnett & Co.* must pay the £88 in full before the silk was given up, and must then prove for the whole debt of £3010 against the estate. *Barnett & Co.* appealed from this decision.

Mr. *Winslow*, and Mr. *Reed*, for the Appellants:—

We claim a set-off under the mutual credit clause, sect. 39, of the *Bankruptcy Act*, 1869. Even before that Act this would have been a case for set-off: *Naoroji* v. *Chartered Bank of India* (1); *Astley* v. *Gurney* (2). But the clause in the new Act is wider than the corresponding clause, sect. 171, in the *Bankruptcy Law Consolidation Act*, 1849, inasmuch as the words "mutual dealings" are used, which did not occur in the former Act.

(1) Law Rep. 3 C. P. 444. (2) Law Rep. 4 C. P. 714.

No exception is made in the case of either party holding a security; but the Act is compulsory, that in all cases of mutual credits there shall be a set-off.

Mr. *Davey*, and Mr. *Finlay Knight*, for the trustee:—

If there had been no bankruptcy there could have been no set-off at law or in equity in this case: *Clarke* v. *Fell* (1); *Pinnock* v. *Harrison* (2). A simple contract debt cannot be set off in equity against a mortgage debt: *Fisher* on Mortgages (3). The provision in the Bankruptcy Acts can only apply to cases in which a legal and equitable right of set-off would have arisen.

The LORD JUSTICE JAMES referred to *Beasley* v. *Darcey* (4) and *O'Connor* v. *Spaight* (5).

LORD SELBORNE, L.C.:—

We think that the judgment is not right in this case. The section in the *Bankruptcy Act*, 1869, is, no doubt, somewhat different from what would have been the law in the absence of bankruptcy, and it is a rule to be administered in bankruptcy. As I understand it, it says, without noticing the subject of security at all, that when there have been mutual credits, debts, or mutual dealings—I say nothing at present upon any distinct meaning of "mutual dealings"—and a proof is to be made in bankruptcy, there is to be a rule of set-off, not, as I understand it, at the option of either party, but an absolute statutory rule—"The balance of such account, and no more, shall be claimed or paid on either side respectively." This is clearly a case of mutual credits at the time of the bankruptcy; on the one hand, there was a large debt maturing, though not matured, to *Barnett & Co.*, and there was a small debt actually due from them to the bankrupt. That being so, *Barnett & Co.* come in to prove, and the statute expressly says that the amount of their proof shall be ascertained by writing off the small debt from the larger, and as debt can co-exist with security, and often does, the fact that nothing is said about security

(1) 4 B. & Ad. 404.
(2) 3 M. & W. 532.
(3) 2nd Ed. p. 923.
(4) 2 Sch. & Lef. 304, n.
(5) 1 Sch. & Lef. 305.

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or lien one way or the other in the section seems to me only to shew that the existence of security is not to affect its operation.

The authorities, as far as they are authorities, are quite consistent with that view, and indeed it seems to me that the case cited as possibly having some bearing the other way, of *Clarke* v. *Fell* (1), is a direct authority against Mr. *Davey's* argument; for, that being an action for trover to recover a chattel which had been sent to be repaired, and in respect of which the tradesman had a lien, Mr. Justice *Littledale* says expressly (2), "If there had not been a contract to pay ready money, I should have been of a different opinion"—in other words, I should have been of opinion, even in trover, that the Plaintiff could recover—" for although in that case there would still have been a lien on the carriage for the work done by the bankrupt, yet, as the bankrupt was also indebted to the Plaintiffs, the question would have been, on which side the balance lay, and that was in favour of the Plaintiffs." Now here, of course, there was no special contract like the contract there, to pay ready money, and the circumstances are exactly what Mr. Justice *Littledale* supposes; and if it had been a case, not of a mutual credit made equivalent to debt under the statute, but of mutual debt at the time of the bankruptcy, I should think that *Clarke* v. *Fell* was an authority that even trover would have lain. In that case Mr. Justice *Taunton* thought that, even in the circumstance of the special contract which there existed, if the question had arisen upon the proof in bankruptcy, the account must have been taken upon the footing of set-off, which would have got rid of the lien; so that it appears that the Court acted upon the principles which are independent of bankruptcy. There is no other authority at all, excepting such as are in favour of the right of set-off.

It seems to me that the plain language of the statute meets the case, and that this order must be discharged.

SIR G. MELLISH, L.J.:—

I am of the same opinion. In a case where there is no bankruptcy, it is clear, at any rate at law, that if a party is in possession

(1) 4 B. & Ad. 404. (2) 4 B. & Ad. 407.

of a chattel, and has a lien upon it for a debt of larger amount from the party who brings the action of trover, there is no right of set-off unless there has been an agreement to set one claim against the other, or unless the owner of the lien has brought an action for his debt, which would let in a plea of set-off on the other side. The simple question is whether, upon the construction of this clause, the set-off is not made equivalent to payment. I doubt whether it does not affect it even before either party has come in to prove; but, at any rate, when the party does come in to prove, the statute sets the one debt against the other, and that is equivalent to payment. It, in fact, is equivalent to saying, where there are mutual debts, that a party, by coming in and claiming to prove, necessarily causes a payment or satisfaction of his debt so far as the set-off extends; and, of course, when the debt is put an end to, the lien would also be put an end to. It appears to me that this construction of the section is altogether in accordance with the general scope of the *Bankruptcy Act*, because it would be very unjust, and contrary to the spirit of the bankruptcy law, to hold, that where there are mutual debts the one creditor should be paid in full and the other should only receive a dividend.

SIR W. M. JAMES, L.J., concurred.

Solicitors: Messrs. *Murray & Hutchins;* Mr. *W. A. Crump.*

L. C. and L. JJ.

1874

Jan. 16.

Ex parte TORKINGTON. *In re* TORKINGTON.

Bankruptcy—Practice—Debtor's Summons—Affidavit—Irregularity—Public Officer of Company—Bankruptcy Rules, 1870, *r.* 15.

In an affidavit filed by the public officer of a company in support of a debtor's summons he was described as the registered public officer of the company, but the affidavit did not contain an express statement that he was such public officer, or that he was authorized to sue out the summons:—

Held, that the affidavit did not sufficiently comply with Rule 15 of the *Bankruptcy Rules*, 1870, and the summons was dismissed for irregularity.

In the affidavit the words "severally make oath and say" were omitted by mistake:—

Held, that the affidavit could not be objected to on that ground after it had been filed.

A debtor may sustain an application to have a debtor's summons dismissed for irregularity, although he has not distinctly denied the debt in his affidavit.

THIS was an appeal from an order of Mr. Registrar *Hazlitt*, sitting as Chief Judge in Bankruptcy.

On the 8th of August, 1873, a debtor summons was served upon *Abner Torkington* according to Form 4 in the Schedule to the *Bankruptcy Rules*, 1870, by which he was warned that unless he should pay to "*John Parker*, of &c., one of the registered public officers of the banking company called the *National Bank*," the sum of £1526 10*s.* 7*d.*, claimed by him according to the particulars thereunto annexed, or compound for the same, he would have committed an act of bankruptcy, in respect of which he might be adjudicated a bankrupt on the petition of the said *J. Parker*.

The affidavit in support of the summons was the joint affidavit of *J. Parker* and the clerk of his solicitors, in which *J. Parker* was described as one of the registered public officers of the *National Bank*; but he did not expressly swear that he was such registered public officer, nor that he was authorized to take proceedings against the debtor. In the affidavit the debtor was stated to be indebted to *J. Parker* in the sum of £1526 10*s.* 7*d.*, being the unsecured part of a debt of £3526 10*s.* 7*d.* due from the debtor to the bank.

The words "severally make oath and say," which ought to have been at the commencement of the affidavit, were by mistake omitted.

The debtor appeared and filed an affidavit, in which he did not in distinct terms deny the debt, but swore that he was not indebted "if credit be given for the securities held by the bank."

He applied to have the summons dismissed on the ground of the following irregularities in the summons and affidavit:—

That the summons and particulars of demand described the debt as due to *Parker* and not to the bank.

That the words "make oath and say" were omitted from the affidavit.

That *Parker* did not swear that he was the registered public officer of the bank (1).

That he did not swear that he was authorized to take proceedings against the debtor.

The Registrar refused to accede to the application, and the debtor appealed from his decision.

Mr. *Fischer*, Q.C., and Mr. *W. D. Gardiner*, for the Appellant.

Mr. *Winslow*, for the *National Bank*, took the preliminary objection that the debtor's affidavit did not distinctly deny the debt, as he ought to do, under Rule 22 of the *Bankruptcy Rules*, 1870, and that until he did so, he could not apply to have the summons dismissed.

The LORD CHANCELLOR:—We think that it is the right of every person who is served with a summons to object to it for irregularity. There are no negative words in the section.

(1) Rule 15 of the *Bankruptcy Rules*, 1870, is as follows:—"A bankruptcy petition or debtor's summons against any debtor to any co-partnership duly authorized to sue and be sued in the name of a public officer or agent of such co-partnership, may be presented by or sued out by such public officer or agent as the nominal petitioner or plaintiff for and on behalf of such co-partnership, on such public officer or agent filing an affidavit according to the form in the schedule, stating that he is such public officer or agent, and that he is authorized to present or sue out such petition or debtor's summons."

No form is given of this affidavit in the schedule to the Rules.

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Mr. *Fischer*, Q.C., and Mr. *W. D. Gardiner*, in support of the objection, as to the omission of the words "make oath and say," referred to *Ex parte Newton* (1); *Phillips* v. *Prentice* (2); *Oliver* v. *Price* (3). As to the other objections, he relied upon the express words of Rule 15 of the *Bankruptcy Rules*, 1870.

The LORD CHANCELLOR:—The objection as to the omission of the words "severally make oath and say," is an objection to the regularity of the affidavit, which it is too late to make now.

Mr. *Winslow*, for the banking company, contended that the description of the deponent as one of the registered public officers of the bank was sufficient to satisfy the rule. If he were not such public officer, he might be indicted for perjury. The meaning of the rule, as to stating his authority for taking the proceedings, is, that he must shew that he is such a public officer as is empowered to sue and be sued on behalf of the company under the *Banking Act*, 7 Geo. 4, c. 46; and that is sufficiently shewn by swearing that he is the registered public officer.

LORD SELBORNE, L.C.:—

We think that it is necessary to follow the rule with reasonable strictness. It is a matter of substance, not of form. The proceedings cannot be regular unless they are commenced according to the rule. The appeal must be allowed and the summons dismissed.

SIR W. M. JAMES, L.J.:—

I am of the same opinion. If the objection to the affidavit is made in good time, it is right that it should be attended to.

SIR G. MELLISH, L.J., concurred.

Solicitors: Mr. *G. C. James*; Messrs. *W. Tatham & Son*.

(1) 2 D. F. & J. 3. (2) 2 Hare, 542.
(3) 3 Dowl. 261.

Ex parte BROOKE. *In re* HASSALL.

L. C. and L. JJ.
1874
Jan. 30; *Feb.* 13.

Execution Creditor—Trader Debtor—Payment to Sheriff before Levy—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 6, *sub-s.* 5, *s.* 87.

The sheriff having received a writ of execution against a trader for a debt exceeding £50, the debtor, on the 24th of July, before any levy had been made, paid to the sheriff's officer a large part of the debt in a bill, a cheque drawn by another person, and bank notes. On the 25th of July the sheriff's officer asked the creditors whether they would accept in part payment what the debtor had given him, and shewed them the bill. They expressed their assent. On the 26th of July (Saturday) the debtor filed a liquidation petition, and a receiver was appointed. On the 28th of July the sheriff's officer, having received the remainder of the debt from another person liable for it, paid the whole to the creditors:—

Held (reversing the decision of the Chief Judge), that the transaction was a payment under pressure; and that the creditors were not bound to hand over to the trustee the bill of exchange, the cheque, or the bank notes.

THIS was an appeal from an order of the Chief Judge in Bankruptcy, affirming a decision of the Registrar of the *Huddersfield* County Court, sitting as Deputy Judge.

J. M. Hassall, a cloth miller, filed a liquidation petition on the 26th of July, 1873, under which a trustee was afterwards appointed.

On the 9th of July, 1873, Messrs. *Brooke & Sons* had commenced an action in the Queen's Bench against *Hassall* to recover £169 4*s.* 2*d.*, due in respect of two bills of exchange upon which *Hassall* was liable. The action was not defended, judgment was entered up by the Plaintiffs, and a writ of execution was issued. On the 24th of July *Hassall*, who expected that an execution would be levied on his goods, called at the office of the sheriff, and was informed by one of his officers that he had received a warrant of execution against *Hassall's* goods, and the warrant was shewn to him. *Hassall* said that he would pay the debt, and the same afternoon he delivered to the sheriff's officer a good bill of exchange for £65, a cheque (not drawn by *Hassall* himself) for £26 3*s.* 6*d.*, and three *Bank of England* notes of £5 each, making altogether £106 3*s.* 6*d.* The remainder of the sum for which the action was brought was paid to the sheriff's officer by a Mr. *Binns*, who was

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also liable upon one of the two bills, and against whom another action had been commenced by *Brooke & Sons*. On the 26th of July (a Saturday) a receiver was appointed under the liquidation petition, and an interim injunction was granted, restraining *Brooke & Sons* and the sheriff from further proceedings. This order was served upon the sheriff's officer the same afternoon, but, notwithstanding this, he, on the 28th of July, handed over the bill of exchange, the cheque, and the notes, together with the money paid by *Binns*, to Mr. *Jacomb*, the solicitor of *Brooke & Sons*. On the application of the trustee under the liquidation an order was made by the Registrar of the County Court, that *Brooke & Sons* should return to the sheriff or his officer the bill of exchange, the cheque, and the three notes. From this order *Brooke & Sons* appealed, and the Chief Judge affirmed the decision (1).

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the Appellants, referred to *Bankruptcy Act*, 1869, s. 87; *Woods* v. *Finnis* (2); *Morland* v. *Pellatt* (3); *Ex parte Rocke* (4); *Slater* v. *Pinder* (5).

Mr. *Little*, Q.C., and Mr. *Winslow*, Q.C., for the Respondents, referred to 1 & 2 Vict. c. 110, s. 12; *Ex parte Rayner* (6); *Collingridge* v. *Paxton* (7); *Ex parte Pearson* (8).

At the close of the argument their Lordships expressed some doubt whether inquiries should not be directed to ascertain what had taken place on the 25th of July, with a view to see whether the creditors had assented to what was handed to the sheriff's

(1) 1873. Dec. 8. WN(1873) 220
SIR JAMES BACON, C.J.:—
I do not see how the Registrar's order can be quarrelled with. There was no seizure and no sale. The debtor bought the forbearance of the sheriff, not by paying the whole debt, but by paying a part of it. When the money was thus paid to the sheriff's officer, whose was it? Clearly that of the man who had paid it. He might have withdrawn it at any time, and have said to the sheriff, Do your worst. I conceive that the cheque, the bills, and the notes remained the bankrupt's property at the time of the bankruptcy. They had not reached the creditor, but had been merely paid to the sheriff's officer to purchase his forbearance. The appeal will be dismissed, but I shall make no order as to costs.

(2) 7 Ex. 363.
(3) 8 B. & C. 722.
(4) Law Rep. 6 Ch. 795.
(5) Ibid. 6 Ex. 228.
(6) Ibid. 7 Ch. 325.
(7) 11 C. B. 683.
(8) Law Rep. 8 Ch. 667.

officer being taken in part payment. One of the creditors being in Court was examined and cross-examined. He deposed that on the 25th of July the sheriff's officer came to their office, and asked whether they would accept in part payment what he had received from *Hassall*, at the same time shewing them the bill of exchange, and that they agreed to accept it. Being asked why, in that case, they did not take possession of the bill, the witness said he had supposed it was the business of the sheriff's officer to see the matter completed.

LORD SELBORNE, L.C.:—

What the creditor has now stated in evidence, when taken with the other circumstances of the case, satisfies us that the mode of payment was assented to by the judgment creditors. There was no seizure. The case does not come within the provision of the Act as to an execution not completed by seizure and sale; a payment was made under pressure to the sheriff's officer, and the money which was paid over to the creditor may be retained by him. The judgment of the Chief Judge appears to shew that the effect of an assent by the judgment creditor had not been prominently brought forward, and it does not seem clear that the Court below would have taken an opposite view to ours if the evidence and argument had been the same.

SIR W. M. JAMES, L.J., and SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Williamson, Hill, & Co.;* Messrs. *Learoyd & Learoyd.*

L. C. and L. JJ.

1874

Feb. 27.

Ex parte BROWN. *In re* JEAVONS.

Bankruptcy—Re-hearing—Bankruptcy Act, 1869, s. 71—*Bankruptcy Rules*, 1870, r. 143.

Although a re-hearing before the same Judge who originally heard the case is not within Rule 143 of the *Bankruptcy Rules*, 1870, yet the Court in granting a re-hearing will have regard to that rule, and will not in general grant a re-hearing after twenty-one days, unless the party seeking a re-hearing can satisfactorily account for the delay.

THIS was an appeal from an order of Mr. Registrar *Spring Rice*, by which he directed that so much of a certain order, dated the 15th of March, 1873, as declared that Messrs. *Brown & Co.* and Messrs. *Cammell & Co.* were entitled to a valid charge under three indentures of the 30th of March, 1872, upon the machinery, engines, and plant in the nature of trade fixtures belonging to the debtor, should be re-heard before him. Messrs. *Brown & Co.* and Messrs. *Cammell & Co.* appealed from this order for re-hearing (1).

The reason given for a re-hearing was that the law on the question whether an assignment of trade fixtures included in an assignment of the leasehold premises to which they were attached required to be registered as a bill of sale had been altered by the case of *Ex parte Daglish, In re Wilde* (2). That case was decided on the 25th of July, 1873. On the 28th of July Messrs. *Lewis, Munns, & Longden*, the solicitors for the trustee, wrote a letter to Messrs. *Ashurst, Morris, & Co.*, the solicitors for Messrs. *Brown* and Messrs. *Cammell*, in reply to a letter from them upon the subject of the fixtures, as follows: —

"Our client considers that none of the fixtures mentioned are trade fixtures; but if they are, they are covered by the decision in *In re Wilde*, decided by the Lords Justices on Friday last, which affirmed the decision in *Hawtrey* v. *Butlin*" (3).

Messrs. *Lewis, Munns, & Longden* again called the attention of

(1) See *Ex parte Mackay, Ex parte Brown, In re Jeavons*, Law Rep. 8 Ch. 643.

(2) Law Rep. 8 Ch. 1072.

(3) Ibid. 8 Q. B. 290.

the solicitors for the creditors to the same case on the 5th of August, 1873; and some further correspondence passed, in which the solicitors for the creditors still claimed the trade fixtures under the terms of the order of the 15th of March, 1873. In the meantime inquiries were being made as to the nature of the fixtures and machinery, and preparations made for a sale.

On the 21st of November, 1873, the solicitors for the trustee for the first time gave notice to the solicitors for the creditors that they intended to apply to the Registrar to re-hear so much of the order of the 15th of March, 1873, as related to the trade fixtures, which they accordingly did on the 17th of December, 1873; and by his desire the matter was mentioned to the Lord Chancellor on the 19th of December; and his Lordship having expressed his opinion that the Registrar might exercise his discretion as to re-hearing the point (1), the Registrar made the order appealed from.

Mr. *Fry*, Q.C., and Mr. *Henderson*, for the Appellants:—

The order which the trustee wishes to have re-heard was made on the 15th of March, 1873.

The 71st section of the *Bankruptcy Act*, 1869, enacts in general terms that "every Court having jurisdiction in Bankruptcy under this Act may review, rescind, or vary any order made by it in pursuance of this Act." But Rule 143 of the *Bankruptcy Rules*, 1870, provides that "an appeal against a decision or order of the Chief Judge in Bankruptcy, or of a Judge of a County Court, shall be entered with the Registrar of Appeals within and not later than twenty-one days from the said decision or order." It is said that as this is not an appeal, but a re-hearing before the same Judge, it is not within the rule; but if not, the same limitation ought to be observed by the Court, unless there is some special reason to the contrary. In this case the alleged ground for re-hearing is the decision of the Court of Appeal in *Ex parte Daglish* (2); but the judgment in that case was given on the 25th of July, 1873, and on the 28th of July the trustee's solicitors called our attention to it, but no steps were taken till December, nearly five months after the decision in *Ex parte Daglish*.

(1) *Ex parte Mackay*, Law Rep. 9 Ch. 127. (2) Law Rep. 8 Ch. 1072.

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Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the trustee:—

The 143rd rule has no application to the re-hearing of the case by the same Judge. That has always been considered a power inherent in every Court, and there has been no limitation to the time within which it has been done except the discretion of the Judge. In *Ex parte Curzon* (1), under the Winding-up Acts, Vice-Chancellor *Kindersley* permitted the Master to review his decision after four years; and under the *Bankruptcy Act*, 1849, by the 12th section of which appeals were absolutely limited to twenty-one days, cases were nevertheless constantly re-heard by the Commissioners after that period. And the same has been done under the present Act. An instance is *Ex parte Bailey* (2). In the present case there was no unreasonable delay, nor have any parties been injured by the delay. The order of the 15th of March, 1873, directed an inquiry as to what the machinery and fixtures consisted of, and then a sale; and during the interval complained of the inquiries were going on and preparation made for a sale.

LORD CAIRNS, L.C.:—

I entertain no doubt that a re-hearing in this case would be extremely improper.

The order of the Registrar was made on the 15th of March, 1873, and was not challenged by any notice of re-hearing until the 21st of November following, eight months after the date of the order. I assume in favour of the Respondent that the Court has jurisdiction, by means of a re-hearing, to operate upon and vary the order if necessary; and I assume that the decision of *Ex parte Daglish* (3), on the 25th of July, 1873, gave the Respondent a new period of departure—it being understood that this is only an assumption in favour of the Respondent. But this case cannot be put higher than if the decision of this case had been on the 26th of July, being the day after the decision in *Ex parte Daglish*. In that case the Respondent would have had only twenty-one days to appeal against the order. It cannot be said that his attention was not drawn to that case, for on the 28th of July his solicitors wrote to the

(1) 3 Drew. 508. (2) Law Rep. 13 Eq. 314.
(3) Law Rep. 8 Ch. 1072.

solicitors of the Appellants, referring to it. If so, he must have brought his appeal within twenty-one days; and it appears to me that we should be departing from our duty if we did not adopt as our guide the intention of the Legislature shewn in fixing that limit in the case of appeals. I do not say that the Court is bound by any express enactment, because re-hearings are not mentioned in the Act, but the granting of a re-hearing is a matter of indulgence, and must be carefully guarded, otherwise parties would gain by indirect means the benefit of an appeal after the time for appealing had expired. In this case the trustee has not accounted for the delay from the 26th of July to the 21st of November, and I think he was then too late. The re-hearing cannot, therefore, be allowed.

SIR W. M. JAMES, L.J., and SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Ashurst, Morris, & Co.;* Messrs. *Lewis, Munns, & Longden.*

Ex parte HOLLAND. *In re* HENEAGE.

Bankruptcy—Married Woman—Married Woman's Property Act (33 & 34 *Vict. c.* 93), *s.* 12—*Separate Estate—Debt before Marriage.*

A married woman was sued at law by a creditor for a debt contracted by her before her marriage, which took place in 1872, and a judgment was obtained against her. The creditor then sued out a debtor's summons, and, the debt not being satisfied, filed a petition for adjudication of bankruptcy against her. She had no separate property:—

Held, that the married woman could not be adjudicated a bankrupt.

Per Mellish, L.J.:—Whether a married woman can be made a bankrupt if she has separate property—*Quære.*

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, sitting as Chief Judge in Bankruptcy.

Mrs. *C. M. Heneage* was married to her present husband, *C. T. F. Heneage*, on the 19th of December, 1872. A few days before the marriage Mrs. *Heneage* borrowed £100 from *Lucy Holland*, which she still owed at the time of her marriage.

On the 3rd of November, 1873, *P. H. Holland*, the husband of

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Lucy Holland, recovered judgment against Mrs. *Heneage* for £106 5*s*. for the debt and costs, and on the 22nd of November he served her with a debtor's summons for that amount. On the 3rd of December, 1873, Mrs. *Heneage* applied to the Registrar to dismiss the summons, on the ground that a married woman was not liable to the provisions of the bankrupt law, but the Registrar dismissed the application.

P. H. Holland then filed a petition for adjudication of bankruptcy against Mrs. *Heneage*. On the hearing of the petition Mrs. *Heneage* opposed the adjudication, and the Registrar dismissed the petition. From this decision *P. H. Holland* appealed. No settlement was made on the marriage of Mr. and Mrs. *Heneage*, and she stated in her affidavit that she had no separate property.

Mr. *De Gex*, Q.C., and Mr. *E. Pollock*, for the Appellant:—

The effect of the 12th section of the *Married Woman's Property Act*, 1870 (1), is to place a married woman, as to debts contracted before marriage, exactly in the same position as an unmarried woman. When the section says that she may be sued, it must be understood that the same consequences should result as on an action against an unmarried woman, with the qualification that her separate property only would be liable. One of these consequences is liability to be made a bankrupt on a debtor's summons. By the custom of *London*, a married woman who is a trader may be made a bankrupt: *La Vie* v. *Philips* (2). So also the wife of a convict, if she becomes a trader: *Ex parte Franks* (3). It is unreasonable to suppose that the Legislature intended that one creditor should be able to gain possession of all a married woman's separate estate without the possibility of the others obtaining a distribution *pari passu*: *Sanger* v. *Sanger* (4); *Johnson* v. *Gallagher* (5); *Morgan* v. *Knight* (6); *Chubb* v. *Stretch* (7). It is not necessary that we

(1) 33 & 34 Vict. c. 93, s. 12: "A husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife, contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such debts as if she had continued unmarried."

(2) 1 W. Bl. 570.

(3) 7 Bing. 762.

(4) Law Rep. 11 Eq. 470.

(5) 30 L. J. (Ch.) 298.

(6) 15 C. B. (N.S.) 669.

(7) Law Rep. 9 Eq 555.

(5) SC 3 De G F J. 494: 7 Jur NS 273

should shew that the married woman has separate property before obtaining the order. We are entitled to have the order of adjudication, and then to inquire whether she has any property. She might acquire separate property subsequently, which would become subject to the bankruptcy: *Bush* v. *Martin* (1); *Beynon* v. *Jones* (2).

Mr. ~~*De Gex,*~~ Q.C., and Mr. *Robertson Griffiths,* for Mrs. *Heneage,* were not called on.

LORD CAIRNS, L.C.:—

The application which is made in this case, to make a married woman a brankrupt, is founded, and it is properly admitted that it must be founded, on the *Married Woman's Property Act,* 1870; and when we look at the provisions of that Act the only one which is material to this question is the 12th section.

That section provides that, "A husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage." This is a very strong and novel provision; and the section then addresses itself to consider what is to be done with regard to debts of that nature, and provides that "the wife shall be liable to be sued for, and that any property belonging to her for her separate use shall be liable to satisfy, such debts as if she had continued unmarried."

Now it must be remembered that the words are, "the wife shall be liable to be sued." These are technical words, and *primâ facie* relate to nothing but a suit at law or in equity, and I should be disposed to read them as meaning that, although the husband should not be liable for the debts, yet the wife might be sued at law or in equity as if she were unmarried. That right has been exercised by the creditor in the present case, who has brought an action, and the action has resulted in a judgment against her which has been unproductive. For the purpose of expounding these words an argument was used by Mr. *Pollock*—and it is the only argument which could be of any avail to him—that the words must be understood to include every result which fairly follows from a suit at law or in

(1) 2 H. & C. 311. (2) 15 M. & W. 566.

L. C. and L. JJ. 1874 *Ex parte* HOLLAND. *In re* HENEAGE.

equity, and that one of these results is a debtor's summons, which would form the foundation of an adjudication in bankruptcy. But he was obliged to confess that all the ordinary consequences of a suit at law or in equity would not follow; for when I put the question to him whether property not settled to her separate use could be taken in execution, he was obliged to admit that it could not be taken. Therefore the argument fails, for it is clear that some of the ordinary consequences of a suit do not follow in the case of a married woman. It appears to me that the words "liable to be sued for" are only introduced for the purpose of being connected with the following words, "any property belonging to her for her separate use." I think the meaning of the section is, that although the husband is not liable for the debts in question, the separate property of the wife is to be liable, and that for the purpose of reaching it she is to be subject to the ordinary process of law or equity.

It may be objected that the result of this interpretation is, that all a married woman's property would fall to the execution of a single creditor, and no way of distributing it equitably among all her creditors would be provided for. The answer to this objection is simple. It may be that the Legislature may have overlooked this result. It may be that, to be logically consistent, it ought to have gone on to provide some way, by process of bankruptcy, or some process analogous to bankruptcy, to reach her separate property, and make an equitable division of it. But has it done so? In my opinion it has not done so by any express provision, and it would be straining the words, which have a technical meaning, to extend them so as to bring married women under the law of bankruptcy, an antecedent law, to which, before this Act, they were not liable. It would, in my opinion, be a violent straining of the Act to alter the *status* of all married women, by making them subject to bankruptcy merely for the sake of carrying out what we may think the logical consequence of this section in the Act. I am not prepared to do this. I think, therefore, the Registrar was right, and the appeal must be dismissed with costs.

SIR W. M. JAMES, L.J.:—

I am of the same opinion, and I entirely concur in the reasons given by the Lord Chancellor. It must be borne in mind that the

possibility of making married women's separate property subject to their debts was well known before the passing of the Act. It was well known that in this Court it could be done in various ways; but it was never supposed that such property could be dealt with in bankruptcy. Mr. *De Gex* referred to the case of *Johnson* v. *Gallagher* (1), in which I tried to deal with the separate property of a married woman, so as to make it distributable equally among her creditors, but unsuccessfully, for my decision was reversed by the Lords Justices. I am of opinion that the Registrar came to a correct conclusion in this case, and I should shrink from making such an alteration in the law affecting married women as to render them liable to be made bankrupt for a debt due before marriage.

SIR G. MELLISH, L.J.:—

I have come to the same conclusion in this case. I am not, however, quite satisfied that if the lady had been shewn to have separate property, it might not have made a difference. Because by the 1st section of the Act a married woman may be a trader, and it appears to me that if a married woman became a trader and had trade assets, it would be analogous to cases under the custom of the City of *London*, under which it was not unusual for a married woman to be made a bankrupt. And I should be sorry to say that there is no way of making a married woman's separate property liable except in equity; for instance, such property as she might have acquired as a trader.

But I think the Act only makes her liable in respect of her separate property, and I do not see how she can be made a bankrupt unless she has been shewn to have separate property. There are no words in the section which can be made to apply to a woman who has no separate property. It is not necessary to decide the other question now, but I do not wish to prejudice the question when it shall arise.

Solicitors for the Appellant: Messrs. *Clennell & Fraser.*
Solicitor for the Respondent: Mr. *W. Kelly.*

(1) 30 L. J. (Ch.) 298.

L. JJ.
1874
Jan. 20. 21.

In re TUPPER.

Debtor's Summons—Secured Debt—Garnishee Order—Petitioning Creditor—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 7.

A creditor who holds garnishee orders covering sums due to the debtor to an amount exceeding the debt due to the creditor, can nevertheless obtain a debtor's summons against the debtor, and proceed thereon to have him adjudged a bankrupt.

THIS was an appeal from an order of Mr. Registrar *Spring Rice* adjudging *C. W. Tupper* a bankrupt.

Messrs. *Tod-Heatly & Co.*, wine merchants, had in June, 1873, recovered judgment at law against *C. W. Tupper*, trading as an Italian oilman, for the sum of £1000 for goods supplied, and they proceeded under sect. 60 of the *Common Law Procedure Act*, 1854, to obtain garnishee orders against trade debtors of *C. W. Tupper*. Part of the debt due was thus recovered by Messrs. *Tod-Heatly & Co.*; but in July, 1873, a debtor's summons was granted by the Court of Bankruptcy, and was served by Messrs. *Tod-Heatly & Co.* on *C. W. Tupper*, requiring him to pay a balance of £108 due to them.

The balance was not paid, and a petition in bankruptcy against *C. W. Tupper* was presented by Messrs. *Tod-Heatly & Co.* in August, 1873, the act of bankruptcy alleged therein being the non-payment of the sum mentioned in the summons.

On this petition *C. W. Tupper* was, by the Registrar, adjudged a bankrupt.

At the time when the adjudication was made, the petitioning creditors still held some of the garnishee orders, not served, but covering sums which would be more than sufficient to pay the balance remaining due to them; and the debtor now appealed from the order of adjudication.

There was a dispute whether anything remained due, and on this question evidence was taken *vivâ voce* before their Lordships, the result of which appears from the judgment.

Mr. *Cracknall*, for the Appellant:—

There was no act of bankruptcy, and the summons ought not to have been granted; for a creditor who holds garnishee orders under which he could recover the amount due to him cannot be said to have used reasonable efforts to obtain payment, according to the words of the 7th section of the *Bankruptcy Act*, 1869.

Mr. *Roxburgh*, Q.C., and Mr. *R. Vaughan Williams*, for the petitioning creditors.

SIR G. MELLISH, L.J.:—

The question in this case is whether the debtor, *Tupper*, was properly adjudged a bankrupt. Judgment was recovered against him by Messrs. *Tod-Heatly & Co.*, the petitioning creditors, for a considerable amount, which amount they say has been reduced to £108 by sums of money received by them in respect of their judgment. [His Lordship then stated the result of the evidence to be that there was no reason to doubt that the sum of £108 remained due.]

Then a question arose which might possibly be of some importance. The act of bankruptcy is the non-payment under a debtor's summons. It appears that several garnishee orders on the debtors of *Tupper* had been obtained for the purpose of realizing the debt due to Messrs. *Tod-Heatly & Co.* Under some of these orders sums of money were actually recovered for which credit had been given; but there were other orders which had never been served upon the debtors of *Tupper*, under which, if they had been served, according to the evidence, the amount of the debt might in all probability have been realized.

The question then arises, whether, under those circumstances, a debtor's summons could properly be taken out, and therefore whether an act of bankruptcy would be committed by non-payment.

What constitutes that act of bankruptcy is described in the 6th sub-section of the 6th section of the Act of 1869, the material words of which are: "and the debtor being a trader has for the

L. JJ. 1874 *In re* TUPPER.

space of seven days, or not being a trader has for the space of three weeks succeeding the service of such summons, neglected to pay such sum, or to secure or compound for the same." Now, "neglected to pay such sum" simply means, "has not paid it" after having received the proper notice. I am of opinion that the words, "or to secure or compound for the same," mean, not that the debtor has not got proper security to give, but that he has not secured or compounded to the satisfaction of the creditor. The creditor is not bound to accept a security any more than he is bound to accept a composition, unless he is willing to do so. There is nothing in those words to prevent an act of bankruptcy being committed.

Then the 7th section is also relied upon. That says, "A debtor's summons may be granted by the Court on a creditor proving to its satisfaction that a debt sufficient to support a petition in bankruptcy is due to him from the person against whom the summons is sought, and that the creditor has failed to obtain payment of his debt, after using reasonable efforts to do so." Now it is said that the petitioning creditors in this case had not used reasonable efforts to obtain payment of the debt, because they had got garnishee orders and had not served them; but if they had prosecuted them they might thereby have obtained payment of their debt.

Now, what is the meaning of those words? It appears to me that it is impossible to distinguish between a garnishee order and any other security that a creditor may have. If we held that there was no act of bankruptcy in this case, we should be holding that no creditor, if he had a security for his debt, could take out or avail himself of a debtor's summons, until he had realized that security.

I am of opinion that that is not the meaning of this section. It would be making a very considerable alteration of the law if we did so hold. Realizing a security may, in many cases, take a very considerable time, and it may be very doubtful whether the debt will thereby be recovered; and there may be various reasons which may induce a creditor not to insist upon realizing his security. I do not think it was the intention of the Act that a

secured creditor could not have a debtor's summons till he had realized his security. I think that the section is only intended to prevent a man from taking out a debtor's summons by surprise, and when he has not pressed for payment.

I am of opinion that there is a good petitioning creditors' debt, and that an act of bankruptcy has been committed.

The appeal must be dismissed with costs.

SIR W. M. JAMES, L.J.:—

I am of the same opinion.

Solicitors for the Appellant: Messrs. *Collette & Collette.*
Solicitor for the Creditors: Mr. *F. Last.*

L. C.
and L. JJ.

1874

March 2.

MILES *v.* HARRISON.

[1866 M. 218.]

Will—Mortmain Act—Marshalling—Direction to reserve the pure Personalty for Charity—Costs.

A testator gave the residue of his personal estate, which consisted of both pure and impure personalty, to trustees upon trust to sell and convert the same into money, and out of the proceeds and out of his ready money to pay his debts, funeral expenses and legacies, and to pay the income to his wife for life, and after her death to raise sufficient to purchase certain life annuities. He then gave some pecuniary legacies, including a legacy of £100 to a charity school, and bequeathed all the residue of his personal estate to three charities in equal shares, and directed that the three last-mentioned bequests should be paid and satisfied out of such part of his personal estate as could be lawfully applied to the payment thereof and which should be reserved by his trustees for that purpose:—

Held (reversing the decision of *Wickens*, V.C.), that the direction respecting the payment of the residuary bequests was equivalent to a direction to marshall the assets in favour of the three charities; and that the debts, funeral and testamentary expenses and legacies other than the legacy to the school, must be paid primarily out of the impure personalty:

That the direction to marshall did not apply to the legacy to the school, which must fail only in the proportion which the impure bore to the pure personalty:

That the costs of the suit were included under testamentary expenses, and must be paid primarily out of the impure personalty.

Wills v. *Bourne* (1) followed.

THIS was an appeal from a decision of Vice-Chancellor *Wickens*.

The Rev. *John Miles*, by his will, dated the 27th of July, 1855, after bequeathing some small pecuniary and specific legacies, gave a certain leasehold estate and all the residue of his personal estate unto *T. Harrison*, *J. W. Buckley*, and *G. J. May*, upon trust for sale and conversion, and upon trust out of the proceeds and out of the ready money of which he should be possessed at his death to pay his funeral and testamentary expenses and debts, and the legacies bequeathed by his will or any codicil thereto, and to invest the remainder in manner therein mentioned. And the testator directed his trustees to pay the income of the trust funds to his wife so long as she should continue his widow, and after her

(1) Law Rep. 16 Eq. 487.

decease or second marriage to raise various sums, amounting in the whole to £9721, for the purchase of Government annuities for the persons therein mentioned. And the testator then gave to the *Westmorland Society School* £100, and two other legacies to individuals, and disposed of the residue of the personal estate in the following terms:—

"As to all the residue and remainder of my personal estate and effects whatsoever and wheresoever which I may be possessed of or entitled to at the time of my decease, I give and bequeath the same as follows, namely: one equal third part or share thereof to *St. Mary's Hospital, Paddington;* one equal third part or share thereof to the *Society for the Propagation of the Gospel in Foreign Parts;* and the remaining one equal third part or share thereof to the *Society for Promoting Christian Knowledge.* And my will is, and I expressly direct, that the three last-mentioned legacies or bequests shall respectively be paid and satisfied out of such part of my personal estate as can lawfully be applied to the payment thereof, and which shall be reserved by my trustees or trustee for the time being for that purpose; and that such legacies and shares of residue shall respectively be applied to the purposes of the said hospital and societies respectively, and the receipts of the respective treasurers of the said hospital and societies respectively shall be sufficient discharges for the same respectively."

The testator made several codicils to his will, by which he disposed of certain real estates which he had purchased since the date of his will, and gave various legacies, but did not alter the residuary bequest contained in his will. He died on the 28th of March, 1866. His personal estate amounted in value to about £60,000, of which about £46,000 was personalty connected with land, and about £14,000 pure personalty.

The testator's widow filed a bill for the administration of the estate, and on the cause coming on for further consideration the question arose whether the testator's debts, funeral and testamentary expenses and legacies, were to be paid rateably out of the pure and impure personalty, or whether they ought to be borne primarily by the impure personalty, for the benefit of the charities, which were residuary legatees.

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MILES v. HARRISON.

The Vice-Chancellor decided that the clause at the end of the testator's will was not sufficient to warrant the Court in marshalling the estate for the benefit of the charities, and that the pure and impure personalty must contribute rateably in the ordinary way (1). From this decision the charities appealed.

Mr. *Lindley*, Q.C., and Mr. *Graham Hastings*, for the Appellants :—

The direction by the testator that shares of the residue given to the charities should be paid and satisfied out of his pure personal estate, which should be reserved for that purpose, was a distinct direction to marshall which the Court cannot neglect. There is no magic in the word "marshall": it is sufficient if the testator's intention is clear. And if the Court does not attach that meaning to the testator's words, it will in fact strike them out altogether; for no other sense can be attributed to them. If the words are read as being equivalent to a direction to marshall there is no difficulty caused by the legacy given to the *Westmorland Society School;* for marshalling only applies to those who have two funds to resort to, and as the *Westmorland Society School* can only resort to the pure personalty, that legacy will be untouched by the testator's direction to marshall, and will be paid in the usual way. We therefore claim that all the debts, funeral and testamentary expenses and legacies (other than the legacy to the *Westmorland Society School*) should be paid primarily out of the impure personalty: *Wigg* v. *Nicholl* (2); *Nickisson* v. *Cockill* (3); *Gaskin* v. *Rogers* (4); *Robinson* v. *Geldard* (5); *Wills* v. *Bourne* (6). In the last-mentioned case, which was decided subsequently to the present, the decision of the Vice-Chancellor in this case was not approved of.

(1) 1873. June 9. WN(1873)137. SIR JOHN WICKENS, V.C. :—

The case is a very difficult one, and the will is exceedingly ambiguous, and I have a strong impression that however I may decide I shall be disappointing the testator's intention. But I do not think that these words are express enough to countervail the general rule of law and the direction given in the earlier part of the will.

(2) Law Rep. 14 Eq. 92.
(3) 3 D. J. & S. 622.
(4) Law Rep. 2 Eq. 284.
(5) 3 Mac. & G. 735.
(6) Law Rep. 16 Eq. 487.

Mr. *Hardy*, Q.C., and Mr. *Crossley*, for the Plaintiff:—

The construction put upon the testator's words by the Appellants makes the will inconsistent and self-contradictory. The testator begins by making a mixed fund of both pure and impure personalty, out of which he directs his debts and legacies to be paid; that is quite inconsistent with an intention of marshalling in favour of the charities. He then gives a legacy to the *Westmorland Society School*, which is put on the same footing with the other legacies, and if the assets are to be marshalled in favour of the residuary legatees, that legacy will fail altogether. We contend, therefore, that the testator did not intend that the assets should be marshalled, but only that the three charities should have their fair proportion of the pure personalty. This is a gift of residue, and what the residue consists of must be determined in the ordinary course of administration. The gift will then only operate on what remains after this is done. This construction makes the will consistent with itself, and is also consistent with the authorities: *Attorney-General* v. *Earl of Winchelsea* (1); *Beaumont* v. *Oliveira* (2).

Mr. *Greene*, Q.C., and Mr. *W. W. Cooper*, Mr. *Dickinson*, Q.C., and Mr. *Whately*, for others of the next of kin, supported the same view.

Mr. *Morgan*, Q.C., and Mr. *J. T. Anderson*, for the executors.

LORD CAIRNS, L.C.:—

I have naturally very great hesitation in arriving at a conclusion in this case which will differ from the opinion entertained by the late Vice-Chancellor *Wickens*, for whose opinion upon all points, but more particularly on a point of this kind, with which he had very great familiarity from the character of his practice at the Bar, I should have the greatest possible respect. At the same time the question turns upon the construction of a few words in a will, a question which is always very likely to give rise to a difference of judicial opinion.

If I were to take the gift of the residue and the words accom-

(1) 3 Bro. C. C. 373. (2) Law Rep. 4 Ch. 309.

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panying that gift in this case by themselves, I own I should have very little doubt as to their meaning. The testator says: "As to all the residue and remainder of my personal estate and effects whatsoever and wheresoever which I may be possessed of or entitled to at the time of my decease, I give and bequeath the same as follows, namely, one equal third part or share thereof to *St. Mary's Hospital, Paddington;* one other equal third part or share thereof to the *Society for the Propagation of the Gospel in Foreign Parts;* and the remaining one equal third part or share thereof to the *Society for Promoting Christian Knowledge.*" Stopping there, I entirely accede to the observations made by the counsel for the Respondents, that we have here that which is merely a gift of residue as such. The words which I have read do not go beyond the gift of the residue, and if they stood alone the natural inference would be that the residue was to be ascertained in the ordinary way. But then that gift is accompanied by explanatory and directory words, which appear to me not to apply to a residue already ascertained, but to apply to the whole of the personal estate of the testator, and, in fact, to direct the mode and to order the manner and form in which the residue is to be ascertained; for the testator continues: "My will is, and I expressly direct that the three last-mentioned legacies or bequests shall respectively be paid and satisfied out of such part of my personal estate," that is, "my whole personal estate," "as can lawfully be applied to the payment thereof, and which shall be reserved by my trustees or trustee for the time being for that purpose." Now I take the word "which," occurring in the last clause, to relate to and to stand for the words "the part of my personal estate which can lawfully be applied to the payment of charitable bequests," and the last clause to amount to this: "I direct that the part of my personal estate which lawfully can he applied to the payment of charitable bequests shall be reserved by my trustees or trustee for the time being for the purpose of paying and satisfying the legacies or bequests in question." I repeat, then, if I were to look at that alone, I should not hesitate to say that that was a plain and sufficiently intelligible direction to the trustees that they were to keep in hand, or at all events, by accounting, to arrive at the same result as if they had kept in hand, what is termed the pure personalty of the testator, to bring

that pure personalty to bear, as far as it could properly be done, upon the payment, and in order to effect the payment which is directed to be made in the gift of the residue—in other words, it would be equivalent, to use technical terms, to a direction that the personal estate should, as the Court of Chancery calls it, be "marshalled," so as to give to the charitable legatees under the residue the fullest benefit that could be given to them with reference to the pure personal estate.

Then, is there anything in any other part of the will which is antagonistic to this, and which will be set aside and violently overridden by this construction? In my opinion there is nothing at all inconsistent with this construction. The part principally referred to as inconsistent was the introductory clause, by which the testator, after giving his leaseholds and ready money and other personalty, directs that out of the moneys to arise from the sale of his leasehold estate, and from the sale and conversion into money of such parts of his personal estate as should not consist of money, and out of the ready money of which he should be possessed at his death, the trustees should pay his funeral and testamentary expenses and debts, and the legacies bequeathed by his will or any codicil thereto, and should invest the residue. That appears to me to be a charging of the whole aggregate fund in the hands of the trustees with all his debts and legacies and administration expenses. That is quite consistent with an intention, on the part of the testator, on the one hand that those entitled to those payments should have the security of the whole of his personal estate, and, on the other hand, that, for the purpose of working out his charitable intention in favour of his residuary legatees, the results, as a matter of money, should be dealt with as if those who had the two funds for their payment took their payment out of the fund which could not be reached by the charitable legatees to whom he had given the residue. It appears to me that there is no inconsistency in the case. Suppose the testator had said, "I give to my trustees all my leaseholds and mortgages and ready money to pay my debts and funeral expenses and legacies," and had then given pecuniary legacies, and then said, as to his residue, expressly, "I give my residue to three charities, but I direct that my assets shall be marshalled, so as to throw them as far as possible on the

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pure personalty," he would have said nothing whatever inconsistent, and the Court would know how to work out the provisions of the will.

Then it is said that if that construction is put upon the gift of the residue, it will be inconsistent with the gift by the testator of £100 pecuniary legacy to the *Westmorland Society School*. I think that objection has been sufficiently answered in the argument. If, as I assume, the gift of the residue amounts to a direction that the personal estate shall be marshalled, a direction of that kind cannot operate to defeat *in toto* the pecuniary legacy to the charity of £100; that legacy will stand upon the footing upon which it would have stood if nothing at all had been said about marshalling in the residuary gift. So far as this legacy would fall on the impure personalty, it must fail, and, inasmuch as the essence of marshalling is that it puts those only to marshall who have got two funds, this charitable legatee, having only one fund, will not be driven to marshall, and the direction to marshall will not be operative as against it; and it will be paid out of the pure personalty according to the proportion which it bears to the impure personalty. It appears to me, therefore, that the decree of the Vice-Chancellor in this respect must be altered, and that a direction must be inserted that the personal estate of the testator is to be marshalled in the usual way, so that, as far as can be done, the three charities taking the residue are to be paid. Of course there will be an intestacy as to anything beyond that.

SIR W. M. JAMES, L.J.:—

I am entirely of the same opinion, for the same reasons; and I so entirely agree with the construction the Lord Chancellor has put on the will, that I do not think it necessary to add anything.

SIR G. MELLISH, L.J.:—

I am also of the same opinion. I think the case is really governed by the judgment of Lord *Selborne* in the case of *Wills* v. *Bourne* (1), for the will in that case was substantially the same as this will would have been if there had been no direction to reserve. If the

(1) Law Rep. 16 Eq. 487.

direction to the trustees had stopped at the words, "And my will is, and I expressly direct, that the last-mentioned legacies or bequests shall respectively be paid and satisfied out of such part of my personal estate as can be lawfully applied to the payment thereof," then that case would have been directly in point: and the words which follow seem to me only to make the matter still stronger and clearer than they otherwise would have been.

Mr. *Lindley*, Q.C., asked that the costs of the suit, including the costs of the appeal, might be paid out of the impure personalty. The testator had thrown the testamentary expenses on the impure personalty, and that included the costs of administering the estate. He referred to *Morrell* v. *Fisher* (1); *Dolan* v. *Macdermot* (2).

Mr. *Dickinson*, Q.C., Mr. *Greene*, Q.C., and Mr. *Hardy*, Q.C., contended that the costs of the suit ought to be borne rateably by the pure and impure personalty. They were not testamentary expenses: *Wigg* v. *Nicholl* (3); *Wills* v. *Bourne* (4).

LORD CAIRNS, L.C.:—

The estate could not have been administered without the direction of the Court. We think that all the costs of the suit in the Court below, and the costs of the executors of the appeal, must be paid out of the impure personalty. The other parties will pay their own costs of the appeal.

Solicitors for the Plaintiff: Messrs. *Batty & Whitehouse.*

Solicitors for the other Parties: Mr. *T. Johnston*, agent for Messrs. *Harrison & Son, Kendal;* Messrs. *W. Tatham & Son;* Messrs. *Scott & Son.*

(1) 4 De G. & Sm. 422.
(2) Law Rep. 3 Ch. 676.
(3) Law Rep. 14 Eq. 92.
(4) Ibid. 16 Eq. 487.

L. C.
and L. J. M.

1874

Feb. 27.

Ex parte LOWENTHAL. *In re* LOWENTHAL.

Bankruptcy—Practice—Debtor's Summons—Affidavit—Irregularity—Public Officer of Company—Bankruptcy Rules, 1870, *r.* 15.

In an affidavit filed by the public officer of a company in support of a debtor's summons he was described as the registered public officer of the company, but the affidavit did not contain an express statement that he was such public officer: and it contained a statement that he was authorized to make the affidavit, but no statement that he was authorized to sue out the debtor's summons:—

Held, that the affidavit sufficiently complied with Rule 15 of the *Bankruptcy Rules*, 1870.

Where a debtor's summons is sued out upon a dishonoured bill of exchange it is not necessary to state or to prove the debt with the same strictness as in an action at law: it is sufficient to state it so that the debtor shall not be misled.

THIS was an appeal from an adjudication of bankruptcy pronounced by the Chief Judge in Bankruptcy.

On the 24th of October, 1873, *J. H. Barber*, the manager and registered public officer of the *Sheffield Banking Company*, sued out a debtor's summons against *Emil Lowenthal*, a merchant, then residing at *Liverpool*, for a sum of £2483 14*s.* 9*d.* due to the company.

The summons, which was according to form No. 4 in the schedule to the *Bankruptcy Rules*, 1870, warned the debtor that unless he paid within seven days to the *Sheffield Banking Company* the sum of £2483 14*s.* 9*d.* due to them, or compounded for the same, he would have committed an act of bankruptcy, on which he might be declared a bankrupt, on a petition being presented by or on behalf of the said *Sheffield Banking Company*.

The particulars of demand accompanying the summons were as follows:—

"I, *James Henry Barber*, of *Sheffield*, the manager and registered public officer of the *Sheffield Banking Company*, do hereby apply to you the said *Emil Lowenthal* for and also demand payment from you of the sum of £2483 14*s.* 9*d.* owing by you to the said *Sheffield Banking Company* as the indorsees for value of the

bills of exchange specified in the schedule hereunder written, with the expenses occasioned by the dishonour thereof respectively, and the interest thereon."

THE SCHEDULE.

Date of Bill.	Drawer.	Acceptor.	Amount.	When due.
Sept. 23, 1872	*Emil Lowenthal.*	*Southam, Wike, & Co.*	£1497 13 0	Jan. 22, 1873
Nov. 4, 1872	Do.	Do.	900 0 0	March 1, 1873

The application for the issue of the summons was supported by an affirmation made by Mr. *J. H. Barber*, which commenced as follows:—

"I, *James Henry Barber*, of *Sheffield*, the manager and registered public officer of the *Sheffield Banking Company*, established and carrying on business under the provisions of the Act 7 Geo. 4, c. 46 (being one of the people called Quakers), do solemnly and sincerely affirm and declare, that I am duly authorized by the said *Sheffield Banking Company* to make this affirmation on its behalf." The affirmation went on to state that *Lowenthal* was justly and truly indebted to the banking company in the sum of £2483 14*s.* 9*d.* as the indorsees for valuable consideration of the two above-mentioned bills of exchange, but it did not state that the affirmant was authorized to demand payment of the debt or to sue out the summons.

The summons was served on *Lowenthal*, and he applied to the Court to dismiss it. In support of his application he made an affidavit, in which he said, "I am not indebted or not liable to the said *Sheffield Banking Company* in the sum of £2483 14*s.* 9*d.*, or any part thereof, as claimed by the above summons and particulars of demand on which the same is issued, it appearing from the said particulars of the said company, on which such summons is founded, that the only persons whose names appear on such bills are the drawer, alleged to be myself, and the acceptors, alleged to be *Southam, Wike, & Co.*, and I say that I never had any dealings or transactions with the said *Sheffield Banking Company*, nor have I ever had dealings or transactions with the said firm of *Southam, Wike, & Co.*, the alleged acceptors of the said bills."

Upon the hearing of this application, it was objected on behalf

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of *Lowenthal* that neither the particulars of demand nor the affirmation upon which the summons was issued stated the debt with sufficient distinctness. It was also objected that the affirmation did not shew how or when the company became indorsees for value, and that the bills ought to have been produced, but they were not. The Judge of the *Liverpool* County Court overruled all these objections, and ordered *Lowenthal* to enter into a bond, in the penal sum of £4960, with two sureties, to pay what should be recovered by the company against him in any proceedings for the recovery of the demand mentioned in the summons. From this order *Lowenthal* appealed to the Chief Judge, who agreed with the Judge of the County Court, and dismissed the appeal, and *Lowenthal* again appealed.

Mr. *Little*, Q.C., and Mr. *Yate Lee*, for the Appellant:—

In the first place, neither the particulars of demand nor the affirmation stated the debt with sufficient distinctness. They do not state that the bills of exchange had been presented to the acceptor or drawer, nor by whom they had been indorsed to the banking company. These things must have been proved in an action at law on the bills, and they ought equally to be proved in a debtor's summons. The bills were not produced to the debtor, and although he asked for their production, it was refused, and the County Court Judge declined to order them to be produced. Again, these particulars of demand are in the name of the public officer, but the summons is taken out in the name of the company. Moreover, the affirmation of the public officer is insufficient, because it does not expressly state that the affirmant is the public officer of the company, nor does it state that he is authorized to sue out the debtor's summons, as required by the 15th of the *Bankruptcy Rules*, 1870. The County Court Judge, therefore, had no discretion as to requiring security; but he was bound to dismiss the debtor's summons: *Chapman* v. *Milvain* (1); *In re Hodges* (2); *Ex parte Wood* (3); *Ex parte Wier* (4); *Ex parte Roche* (5).

(1) 5 Ex. 61.
(2) Law Rep. 8 Ch. 204.
(3) 4 D. M. & G. 875.
(4) Law Rep. 7 Ch. 319.
(5) Law Rep. 3 Ch. 238.

[The LORD JUSTICE MELLISH referred to *Ex parte Torkington* (1).]

Mr. *G. W. Lawrance* (Mr. *De Gex*, Q.C., with him), for the *Sheffield Banking Company*:—

The debt was stated in the particulars of demand with sufficient clearness for the debtor to know what the claim really was, and nothing more was required. On the other hand, the debtor made an affidavit in which he studiously avoided pledging his oath that he was not indebted to the banking company. Under these circumstances there was a *primâ facie* case against the debtor, and it was the duty of the Court to require security from him. With respect to the affirmation of the public officer, his description as the registered public officer of the company was sufficient without an express statement to that effect in the body of the affirmation: *Allen* v. *Thompson* (2); and his statement that he was authorized to make the affirmation was equivalent to a statement that he was authorized to take the proceedings.

Mr. *Little*, in reply.

LORD CAIRNS, L.C.:—

The chief question for our decision in this case is whether there was sufficient evidence of the debt to justify the County Court Judge in requiring the security which he ordered the debtor to give. The affidavit of the public officer of the bank proved that the banking company were the holders of the bills, which were described by their amounts and dates, and of which the debtor was stated to be the drawer, and the banking company the indorsees for value. No one could have any doubt, on the face of the demand and of the affirmation, that the banking company claimed from *Lowenthal* the sum in question as indorsees for value of the bills. In this state of things *Lowenthal* is told by the Rules that if he can shew that he is not indebted, he must make application to the Registrar to dismiss the debtor's summons by filing an affidavit that he is not so indebted. He does make the application and files an affidavit. If he had sworn that he was not indebted, or that he was not the drawer of the bills, I should

(1) *Ante*, p. 298. (2) 2 Jur. (N.S.) 451.

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have thought that he had shifted the burden of proof of the debt on the creditors. But in place of that he filed an affidavit, in which he says that he is not indebted, qualified by an alternative statement, which is an argument by which he seeks to shew that he could not be liable at law. This is as far removed as possible from an affidavit which I should expect from a person denying the debt. On that affidavit the Judge was, in my opinion, justified in calling on the debtor for security, and would not have discharged his duty if he had not done so. It is said that the production of the bills was asked for by the debtor, but that they were not produced. I should have been better pleased if the Judge had ordered the production of the bills; but it is a matter which was within the discretion of the Judge, and his decision is not a miscarriage which would justify us in interfering with his order. On this point, therefore, the appeal fails.

Then there are two objections to the summons of a technical kind. First, it is said that the affirmation does not state expressly that *Barber* was the public officer. I think that, as he is described as the public officer, the fact is sufficiently stated. If he was not really the public officer, he would have been liable on that affidavit for false swearing.

Secondly, it is said that the affidavit does not state that he was authorized to sue out the debtor's summons. That point does not appear to have been argued before the County Court Judge; it is not mentioned in his judgment. But I am of opinion that the objection is not tenable, and that the deponent does substantially state that he was authorized to take the proceeding; for he states that he "is authorized to make this affirmation," that is, to take the initiative in this proceeding; and I think that would carry with it the authority to sue out the summons. But if there is any doubt upon the point, I think it is covered by the principle laid down in the 19th section, which provides that no objection can be allowed to the particulars unless the Court shall consider that the debtor has been misled by them. The appeal must, therefore, be dismissed.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The first question is, whether there were materials before the County Court Judge on which it was

right for him to issue the debtor's summons. For, although the debtor is required to make the affidavit in support of his application, yet he may object that there were no materials on which the Court could issue the debtor's summons. First, it is said that this summons is taken out in the name of the banking company instead of the public officer. It is really the debt of the bank, although the summons is *de facto* sued out by the public officer. And as there is no form given in the schedule for suing out a summons for a debt due to a company, I think they were justified in not altering the form given in the Act for ordinary cases.

It is also objected that there was no sufficient affidavit of the debt. It is true that the affirmation does not go through all the details which are set out in a declaration at law, but it states that the debtor was indebted on a bill of exchange, the particulars and amount of which are given, and I think that was sufficient.

Then it is objected that the affirmation did not comply with the 15th rule, which says that the public officer is to make an affidavit stating that he is such public officer. On the authority of *Allen* v. *Thompson* (1) there is no doubt that it is sufficient that he described himself in the affirmation as the public officer of the bank. That case was not cited in *Ex parte Torkington* (2), in which case there were also other irregularities in the affidavit upon which the decision of the Court was founded.

Then it is said that it is not stated in the public officer's affirmation that he was authorized to sue out the summons. But he says that he was authorized "to make this affirmation." It appears to me very probable that the word "affirmation" was simply a mistake for "application"; but however that may be, it was impossible that he should be authorized to make the affirmation without being also authorized to sue out the summons. I think, therefore, that is sufficient.

Was, then, the debtor entitled to call upon the Judge to dismiss the summons without requiring him to give security? If the debtor proves absolutely that there is no debt, the summons is to be dismissed; but if he does not do this, and if there is a question to be tried, the Judge has a discretion, and if on the balance of evidence he thinks there is a probability that a good

(1) 2 Jur. (N.S.) 451. (2) *Ante*, p. 298.

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defence will be made out, usually no security is required; but if this is not made out to his satisfaction, it is right that he should require security. In the present case the affidavit of the debtor was manifestly insufficient. No one can present a petition for adjudication of bankruptcy on this summons except the *Sheffield Banking Company*, and when the petition is heard, the question of the debt will have to be tried. Therefore no injury will be done to him even if he is unable to give security.

Solicitor for the Appellant: Mr. *H. G. Field*, agent for Mr. *T. Etty, Liverpool.*

Solicitors for the Bank: Messrs. *Phelps & Sidgwick*, agents for Messrs. *Sale & Co., Manchester.*

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[1872 R. 27.]

Railways Clauses Act, 1845, *ss.* 76, 92—*Use of Railway—Injunction—Specific Performance.*

A railway company having refused to allow the Plaintiffs to run engines and carriages over part of their line under the powers of the *Railways Clauses Act*, 1845, s. 92, the Plaintiffs filed their bill for an injunction to restrain the company from preventing their exercise of the right:—

Held (affirming the decision of *Hall*, V.C.), that, inasmuch as the Plaintiffs could not run over the line unless the points and signals on the line were properly worked by the railway company, this Court could not grant relief, as it does not order the performance of a continuous act like working signals, the doing of which requires continuous attention, and cannot be seen to by the Court.

THIS was an appeal by the Plaintiffs from a decree of Vice-Chancellor *Hall*, dismissing their bill with costs.

The Defendants were lessees of the *Aberdare Railway*, and were working it under Acts of Parliament with which the *Railways Clauses Consolidation Act*, 1845, was incorporated.

Part of the *Aberdare Railway* extended from *Abergwaur*, near *Treaman Station*, to *Mountain Ash Station*, a distance of between two and three miles. At *Abergwaur* the Plaintiffs had a colliery with a siding running into the railway near the *Treaman Station*, and they had two other collieries with a siding running into the railway at that station. At *Mountain Ash Station* the railway communicated with the *Great Western Railway*.

For some years the coal raised from the Plaintiffs' collieries had been carried by the Defendant company, but in 1871 the Plaintiffs, in order to save expense, became desirous of carrying it themselves over the Defendants' railway between *Abergwaur* and *Mountain Ash*, and on the 12th of December, 1871, gave the *Taff Vale Company* notice that the Plaintiffs, pursuant to the provisions of the *Railways Clauses Consolidation Act*, 1845, and especially sect. 92, desired to use with the engine and carriages thereinafter mentioned so much of the *Aberdare Railway* as extended from *Abergwaur* to *Mountain Ash;* that the engine was called the *Progress*, and

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might be inspected at *Aberaman* at any time, and that the waggons were those mentioned in a list at the foot of the notice. On the 23rd of December the Defendants' secretary wrote to say that the engine would be inspected on the 28th. On the 27th the Plaintiffs' secretary wrote to the Defendants' secretary, saying that, to prevent any misunderstanding as to the suitability of the engines proposed to be used, the Plaintiffs were now intending to use the locomotive engines belonging to the *Rhymney Railway Company*, which had been already approved by the Defendants and were then running over their line, and that on the next day he should be prepared to submit the proposed times of running the engines and trains. On the 3rd of January, 1872, the Plaintiffs' secretary sent a time-table of the proposed times of five up-trains and five down-trains between *Treaman* and *Mountain Ash*. No answer having been received, the Plaintiffs' secretary, on the 23rd of January, wrote again, stating that on and from Thursday, the 1st of February, the Plaintiffs would run trains according to the time-table, and that the engines would be those belonging to the *Rhymney Railway Company* then running on the Defendants' railway, and the carriages those mentioned in the former notice.

On the 31st of January the secretary of the Defendants replied by a letter, in which he stated that the Defendants protested against what was in effect giving the *Rhymney Company* running powers over their line, and said that the Defendants had received no notice pursuant to 8 Vict. c. 20, s. 115, as to the engines proposed to be used, and would not allow the trains to run as proposed by the letter of the 23rd.

On the 1st of February, 1872, an engineer went on behalf of the Plaintiffs to *Mountain Ash Station* to take one of the *Rhymney* engines with a train of empty waggons to the *Treaman* siding, but found that the gates were locked so as to prevent it passing on to the line. He saw the traffic manager, who said, "I have no instructions about your running on our line, and if you insist you must take the responsibility; but our men shall not move the signals for you," or to that effect. The engineer replied, "If that is the case we cannot proceed." The train accordingly, after some delay, was run back.

On the 8th of February, 1872, the bill was filed, praying for an

injunction to restrain the Defendants, their servants, and agents from locking the gates or permitting them to be locked, and from keeping or permitting them to be kept locked, and from making or permitting any other obstruction, or doing or permitting any other thing so as to prevent or interfere with the proposed use of the railway by the Plaintiffs; and for damages.

The Plaintiffs, on the 7th of March, 1872, moved before Vice-Chancellor *Wickens* for an injunction, which his Honour declined to grant on the ground that the working of the signals on the Defendants' line was necessary to enable the Plaintiffs to run over it, and that the Court could neither bind the Defendants to allow the Plaintiffs to work the signals, nor compel the Defendants themselves to work them.

The bill was afterwards amended by introducing an allegation that, with regard to any signals put up by the Defendants, the Defendants' tolls included their remuneration for all charges for such signals, and for the use of the points and for signalmen and pointsmen, and all other expenses incidental to the ordinary working and use of their line by engines and carriages not belonging to them, and that the Defendants were not entitled to use the signals or points in such a manner as to obstruct the use of the railway by the Plaintiffs as proposed, but that the Defendants were bound to make and permit, as an incident to such user by the Plaintiffs, a proper use of the points and signals; and a further allegation that there was no practical difficulty arising from signals, points, or other causes in giving effect to the right of user by the Plaintiffs, and that in fact similar rights of user were daily exercised over various other railways in the kingdom.

On the 9th of December, 1873, the bill was dismissed with costs by Vice-Chancellor *Hall*, His Honour being of opinion that, though the Plaintiffs had a statutory right to use the railway on fulfilling the requisite conditions, yet, as it could not be used without the points and signals, the Court could not grant any relief, for that the Court could not give directions as to acts of such a nature that it could not see to their being performed (1).

Mr. *Greene*, Q.C., and Mr. *Marten*, Q.C., for the Appellants:—

We have a statutory right to use the railway under the *Railways*

(1) See W.N. (1873) 227; 22 W.R. 182.

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Clauses Consolidation Act, 1845, s. 92, and we seek to have that right protected. In *Bell* v. *Midland Railway Company* (1) the Court interfered to protect statutory rights under the Act, and in *Greene* v. *West Cheshire Railway Company* (2) it interfered, by way of specific performance, to make a railway company construct and maintain a siding.

[The LORD JUSTICE JAMES:—I doubt whether this Court can give effect to the rights conferred by sect. 92. As far as my experience goes, the Court has never ordered anything which involves doing something from day to day for an indefinite period.

The LORD JUSTICE MELLISH:—I feel the same doubt, and am disposed to think that a Court of Common Law would feel the same difficulty as to a mandamus. A Court can only order the doing something which has to be done once for all, so that the Court can see to its being done. The *Railways Clauses Act* was passed at a time when the working of railways was not well understood. The Legislature seems to have considered that there was no more difficulty about running over a railway than along a turnpike road. It is found now that the use of points and signals is required; but how can the Court see to the Defendants working them day after day for a series of years?]

The Defendants would only have to go on working the points and signals as they do. The necessary use of them is included in the use of the line: *Midland Railway Company* v. *Ambergate Railway Company* (3); and the bye laws provide for the management of the line.

[Sects. 76, 108, 115, were also referred to.]

The LORD JUSTICE MELLISH:—I do not see anything in the Act that authorizes you to get the benefit of the services of the Defendants' servants.

Mr. *Lindley*, Q.C. (Mr. *Cracknall* with him), for the Defendants, was heard as to costs only.

(1) 3 De G. & J. 673. (2) Law Rep. 13 Eq. 44.
(3) 10 Hare, 359.

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SIR W. M. JAMES, L.J.:—

I am of opinion in this case that the judgment of the Vice-Chancellor cannot be disturbed. True it is that, under the 76th and 92nd sections of the *Railways Clauses Consolidation Act*, the Plaintiffs appear to have the right given to them of using this railway with their engines, but, as pointed out by Vice-Chancellor *Wickens*, and afterwards by Vice-Chancellor *Hall*, it is impossible for them to exercise that right without danger, unless there is a continuous use of the signals and of the points by the Defendants' own people. Now it is, I think, impossible to say that a company ought to be compelled by this Court to trust its points and signals, upon which so much of the safety of mankind now depends, to any other persons than its own pointsmen and its own signalmen. If, therefore, relief is given to the Plaintiffs, it must in substance involve ordering the Defendants to work the points and signals. But it is not the practice of this Court to compel by injunction either a company or an individual to do a continuous act which requires the continuous employment of people. The Court will in a proper case restrain a man from singing at one theatre, but it will not undertake to compel him to sing at another; it may restrain him from writing a book for one publisher, but it cannot compel him to write a book for another. Where what is required is not merely to restrain a party from doing an act of wrong, but to oblige him to do some continuous act involving labour and care, the Court has never found its way to do this by injunction. Both the learned Vice-Chancellors say that in all their experience they have never known such an injunction granted. My experience is the same. I think, therefore, that the order dismissing the bill must remain affirmed. At the same time it is to be observed that the Plaintiffs come here to enforce a right which the Act of Parliament gives them, and which the Legislature intended them to have, and that they do not fail on the merits, the question as to the approval of the engines being a mere thing thrown in, and the real question between the parties having throughout been whether the Plaintiffs have a right to use the railway at all. The Plaintiffs fail only because of the difficulty in the way of this Court's enforcing such a right—a difficulty which to my mind is insuperable. As their case, then, fails, not on the merits, but on the

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ground of the difficulty in giving them a remedy, I think that the bill should be dismissed without costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Field, Roscoe, & Co.*; Messrs. *Bircham & Co.*

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McCLEAN *v.* KENNARD.

[1870 M. 239.]

Partners—Joint Contract—Death of one Contractor—Share of Profits—Blank in Agreement—Parties to Agreement—Evidence of Intention.

Five contractors jointly contracted to build a harbour, the building of which would take at least five years. Soon afterwards one of the contractors died:—

Held, that his estate was entitled to share in the profits of the contract; and that those profits were to be the actual profits ascertained when the contract was completed, and not by valuation or by sale of the contract.

Ambler v. *Bolton* (1) distinguished.

The deceased contractor named in his will three executors. Before the will was proved, the four other contractors signed an agreement, in which they, and also the executors of the will, were the parties, a blank being left for the names of the executors. The will was afterwards proved by two only of the executors, and those two executors then signed the agreement:—

Held, on the construction of the agreement, that, though signed by two only of the executors, it was binding on the other contractors:

Held, also, that no regard could be paid to evidence that the other contractors expected the concurrence of the third executor, and would not have entered into the agreement if they had been aware that he would renounce.

Decree of *Bacon*, V.C., reversed.

IN the years 1868 and 1869 negotiations as to the construction of a harbour at *Alexandria* were going on between the Egyptian Government on the one side, and *W. B. Greenfield* and *R. W. Kennard* on the other side. On the 23rd of August, 1869, *R. W. Kennard, G. Elliot, J. R. McClean, J. Abernethy*, and *W. B. Greenfield*, as contractors, addressed a letter to *Nubar Pacha*, the Egyptian envoy, accepting the terms proposed by him for the works at *Alex-*

(1) Law Rep. 14 Eq. 427.

andria. No articles of partnership were made between the five contractors, but it was agreed that the profits and losses should be shared equally. It was estimated that the works would cost £2,000,000, and take five years for their completion, and according to the statement of the Plaintiffs the terms of payment, and several other important matters, remained unsettled when, on the 11th of January, 1870, *R. W. Kennard* died. By his will he appointed his brother, *J. P. Kennard*, and his sons, *H. J. Kennard* and *E. Kennard*, executors and trustees thereof, and gave the trustees power to carry on any trade or business in which any part of his property might be invested. On the 11th of March, 1870, a letter was received from the Egyptian Government, which, as the Plaintiffs alleged, introduced new terms into the agreement as to the works at *Alexandria*, and was assented to by the four surviving contractors. Much discussion took place as to the interest which the estate of *R. W. Kennard* took in the contract; the other four contractors contending that they were not obliged to take into partnership his executors, though they were willing to pay the executors the fair value of his interest.

Ultimately, by the intervention of Sir *W. Drake*, terms were arranged, and Sir *W. Drake* drew an agreement as follows:—

"Memorandum of agreement, made the 20th day of May, one thousand eight hundred and seventy, between the undersigned *William Bunce Greenfield*, of *Great George Street, Westminster*, Esquire; *George Elliot*, of the same place, Esquire, M.P.; *John Robinson McClean*, of the same place, Esquire, M.P.; *James Abernethy*, of *Delahay Street, Westminster*, Esquire; and , executors and trustees of the will of the late *Robert William Kennard*, deceased:—Whereas the parties hereto are jointly interested as co-contractors in a contract entered into with his Highness the Khedive of *Egypt* for the execution of certain works in the harbour at *Alexandria*, and it has been agreed between them as follows:—

"1. The contract to be carried out on joint account of the co-contractors, and in the best interests of all concerned in the contract. All the co-contractors will contribute in equal shares towards the expenses of carrying it out.

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"2. The executors and trustees of the will of the late *Robert William Kennard* to be sleeping partners, the acting partners being Messrs. *McClean, Elliot, Greenfield,* and *Abernethy,* who are to give all necessary personal superintendence in carrying out the contract."

"13. In the event of the death of any of the acting partners before the completion of the contract, the personal representatives of such deceased partner to be sleeping partners, in the same manner as Mr. *Robert William Kennard's* executors and trustees; the active management of the affairs of the co-partnership remaining with the surviving acting partners."

"15. The agreement is to be binding as between themselves upon the parties whose signatures are hereto annexed as from the date hereof, and upon the executors and trustees of Mr. *Robert William Kennard* as soon as they have signed the same."

Four copies of this agreement were made, and some of the copies were, on or about the 20th of May, 1870, signed by *J. R. McClean, G. Elliot, J. Abernethy,* and *W. B. Greenfield,* the blank for the names of the executors and trustees still remaining.

On the 21st of May, 1870, the will of *R. W. Kennard* was proved by *H. J. Kennard* and *E. Kennard* alone; and by a deed poll dated the 8th of June, 1870, *J. P. Kennard* disclaimed the trusts of the will. *H. J. Kennard* and *E. Kennard* afterwards signed a copy of the agreement, and on the 4th of July, 1870, wrote to Sir *W. Drake,* informing him that they had done so, and that they wished to sign the duplicate.

On the 20th of November, 1870, the bill in this suit was filed by *J. R. McClean* and *G. Elliot* (to whom *J. Abernethy* had assigned his interest) against *H. J. Kennard, E. Kennard,* and *W. B. Greenfield,* stating, amongst other things, as above stated, and that the Plaintiffs knew that *J. P. Kennard* had been appointed executor and trustee of the will; that the Plaintiffs were not informed that he intended to disclaim; that wherever the words "executors and trustees" were used the Plaintiffs understood them to include *J. P. Kennard;* and that *H. J. Kennard* and *E. Kennard* knew perfectly well that those words were used in that sense, and in no other. That the Plaintiffs knew that *J. P. Kennard* was a man of large fortune; but that the other executors had little except what they derived

from their father, who had seven other children; and that the Plaintiffs never intended to admit them alone into the partnership. That until the letter of the 4th of July, 1870, was received, the Plaintiffs were not aware that *J. P. Kennard* had disclaimed; and that ever since the receipt of that letter they had refused to allow *H. J. Kennard* and *E. Kennard* to sign the duplicates of the agreement. The bill also raised a question as to the effect of a settlement of part of his property made by *R. W. Kennard*, which question was held not to affect the decision. And the bill prayed a declaration that the agreement was void, and ought to be delivered up to be cancelled; and that the rights of the parties might be determined by the Court; and if the Court should be of opinion that a partnership existed between the Plaintiffs and *H. J. Kennard* and *E. Kennard*, then that such partnership might be wound up, or dissolved in the usual manner.

H. J. Kennard and *E. Kennard*, by their answer, said that the proving of the will of *R. W. Kennard* had been delayed because a caveat had been entered against it; and that the proof on the 21st of May had no reference to the agreement. They also said that the Plaintiffs were always aware that *J. P. Kennard* did not intend to prove the will. They also said that *R. W. Kennard* had spent above £1000 in the preliminary survey and in expenses relating to the contract.

Both sides entered into evidence, the effect of which is stated in the judgments of their Lordships.

The Vice-Chancellor *Bacon* made a decree setting aside the agreement, and directing the interest of the executors in the contract to be valued (1). The Defendants *H. J. Kennard* and *E. Kennard* appealed.

(1) 1873. June 25.

SIR JAMES BACON, V.C., after stating the facts as to the making of the contract, continued:—

Up to that time, as a member of that partnership at will, without any written articles or stipulations, *R. W. Kennard* was entitled to share in the profits, and was liable to bear his share of losses, if there had been any, and was, in my opinion, entitled to an equal share in the then beneficial value of the concession or contract; and I think it is equally clear that after his death his estate would not be in any degree liable for losses, if losses had subsequently occurred. The burthen of fulfilling the contract rested upon the survivors. All that they did after Mr. *Kennard's* death was at their own risk. The relation which had subsisted

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Mr. *Kay*, Q.C., and Mr. *Cracknall*, for the Appellants:—

We succeeded to the rights and liabilities of our testator, and are entitled to the profits of the contract, whatever they may be.

between them was determined, not by any act of theirs, but by that inevitable accident which had deprived them of the co-operation and of the co-liability of their late partner, and which had made them personally the sole contractors with the Egyptian Government. They were not at liberty to withdraw from the contract. It is extremely doubtful whether they could by any means sell or dispose of the concession, if it had been treated as a partnership asset, so as to ascertain the actual value of *Robert William Kennard's* one-fifth; and it seems clear that they could not by any such means free themselves from the liabilities they had incurred.

Being then compelled to proceed with the contract, the question arises, for whose benefit they were so to proceed. It is not suggested that there had been any stipulation between the five partners as to what should ensue upon the death of any of them; and I know of no principle of law by which it can be held that the representatives of a deceased partner engaged in such a contract as here existed can claim to be admitted to the partnership and to fill the place of the deceased. The utmost legal right of such representatives appears to me to be that they should be paid by the continuing partners the value of that share of the partnership assets which up to the time of his death he had enjoyed and possessed, and for which value the continuing partners became debtors. The representatives not being bound farther to continue the partnership undertaking, could have no right to require the survivors to desist from fulfilling their personal engagements, or to insist that if the contract was continued it should be for their benefit as if their testator had remained alive.

Although in many of the cases on this point there may be found some resemblance, more or less remote, to the circumstances here presented, I can find none in which the rights of the personal representatives of a deceased co-contractor have been carried further than I have stated. It is impossible to draw from any of the decided cases a clear and fixed rule which shall be universally applicable; and in each instance in which any such question may arise, the only safe guide to its determination must be the general principles of the law, which are unchangeable, and that is sense and plain justice, from which those principles are derived. [His Honour then stated the proceedings after the death of *R. W. Kennard*:—]

It is under those circumstances that the more important, and indeed what may be properly called the vital question in the cause arises, namely, whether a valid and binding agreement for the admission of the Defendants *Howard John Kennard* and *Edward Kennard* into the partnership has been concluded by the instrument of the 20th of May. The Plaintiffs insist that, upon the death of *Robert William Kennard*, such agreement as up to that time had subsisted between him and the other persons concerned in the concession of contract, came to an end, and that, although they were, as they still are, willing to pay to the representatives whatever amount may be ascertained to be the value of such interest in the contract, they were under no other

The contract must be carried out, and we shall then take our share of the profits or bear our share of the losses. There is no other way of ascertaining what our interest is. The contract cannot be

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liability to his estate. This being the state of things up to April or May, 1870, when the negotiations mentioned in the pleadings and evidence commenced, the Plaintiffs say that they were willing to admit the Defendants, together with *John Peirse Kennard*, whom they knew to be a trustee of *Robert William Kennard's* will, and to be a man of large fortune, into a partnership for the purpose of carrying out that undertaking, but they never intended to admit the Defendants alone into such partnership. That it was with this intention and with this belief that the Plaintiffs and *James Abernethy* settled the terms of the instrument of the 20th of May, and signed it, and that when they discovered that *John Peirse Kennard* had not only renounced and disclaimed the office of trustee of the will, but that he declined to be a party to the agreement, they determined that they would not complete the intended arrangement with two only of the three persons who were intended to be parties to the contract.

In this state of the evidence, it being impossible to reconcile the statements of the parties where they are in conflict, I am compelled to consider what is the legal effect of what has been done. I find a paper signed by some only of the parties on whom it was intended to be binding. I am asked by the Defendants, in effect, to fill up the blank by inserting the names of the Defendants *Howard John Kennard* and *Edward Kennard*, because they have since the date of the agreement, become by the disclaimer of *John Peirse Kennard*, the only executors and trustees of the will. Nothing, I conceive, short of the consent of all the parties would authorize me so to deal with this imperfect instrument. Not only is there no such consent, but the Plaintiffs insist that if the blank were to be so filled up, it would not express that which was the true meaning of the instrument, and they have proved this assertion by the only means which are in their power, and which the nature of the case admits of. They say that I have no right or reason to disbelieve that they intended to contract with three persons, known to them by name, one of whom was recommended to them by the fact that he was a person of wealth and of mature experience, that they would not have engaged with the two Defendants alone; and they had in fact declined to enter into an engagement with one of them. The three persons with whom alone they say they intended to contract, had been designated as trustees and executors of the will. Whatever question there may be (if there be any) as to the power of the executors and trustees to commit the estate of which they were representatives to the risk of the contract then in operation, would not concern the Plaintiffs, if they engaged, as by the terms of the agreement it was intended they should, the personal liability of the new partners, who were to contribute their share towards the expenses of carrying out the contract; and there is no suggestion that such liability should be limited or in any way affected by the terms of the will. The existence of the settlement, it is admitted, was not communicated to them; what effect that settlement might have had upon the powers of the per-

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sold, nor can it be valued. There was nothing personal in the matter, and *R. W. Kennard* would not have gone to *Egypt* to superintend. Of course we have no right to any new business undertaken by *R. W. Kennard's* partners, but his executors have a right to a share of the profits of all the old business.

The agreement merely arranged the details, but it was quite proper to be made, and the others are bound by it, though *J. P. Kennard* was not a party. Even if the blank was never filled up, and the executors were not named, still when the executors signed the agreement it would be valid.

Mr. *Lindley*, Q.C., and Mr. *Cookson*, for the Plaintiffs :—

The substantial question is, whether the executors were partners

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sonal representatives, it is unnecessary to inquire into, but as one other person was then unquestionably a trustee of the settlement, I think that the Plaintiffs and the other parties to the agreement of May ought to have been informed of it; although this is a matter of very small, if any, importance.

The Defendants insist that the only object of the Plaintiffs was to secure the testator's representatives, whoever they might be, as parties to the agreement; and they support this contention by the assertion I have alluded to, that *Howard John Kennard* informed one of the Plaintiffs that *John Peirse Kennard* did not intend to act, and that he informed Sir *William Drake* that *John Peirse Kennard* intended to disclaim and retire from the trusts. If these facts had been more clearly established than I think they are by the evidence, I do not think they would fix upon the Plaintiffs the obligation of performing, with the Defendants *Howard John Kennard* and *Edward Kennard*, that contract which they had intended to enter into with those two persons and *John Peirse Kennard*, and that *John Peirse Kennard* had not conclusively determined in May to do that which he had not made up his mind to do until the month of June following, is, I think, clear from the statements of the Defendant *Greenfield*.

I find, therefore, a total absence of that *consensus* which is the essential and indispensable element in every agreement, and, considering the nature and effect of the intended agreement, and of the subject to which it relates, I think the Plaintiffs are entitled to call for the present decision of the Court as to its validity, in order to prevent the inconvenient results which might ensue if it were left in doubt.

I must, therefore, declare that the written documents or agreements of the 20th of May, 1870, are not binding as between the Plaintiffs and the Defendant *Greenfield*, on the one side, and the Defendants *Howard John Kennard* and *Edward Kennard*, on the other. The usual accounts will be directed up to the time of *R. W. Kennard's* death, and a valuation must be made of his interest under the contract at the time of his death.

with the surviving contractors. The contract was joint, and before the works had been begun one of the partners died. His estate was therefore relieved from liability, and also lost all right to any profits. A joint contract is not like a joint debt. How is the capital to be found? Can these executors say that the other contractors are to find capital and give a share of the profits? The four survivors might be driven to file a bill in an administration suit, in order to get capital from the executors. When a partner dies, the partnership, in the absence of special provisions, is dissolved; and there are two ways of winding up the concern—one is selling, the other is having the interest of the deceased partner ascertained by valuation: *Ambler* v. *Bolton* (1).

Then as to the agreement. We say that we were willing to admit the executors of *R. W. Kennard* to share, but then we understood that *J. P. Kennard* would be a party, as he was a rich man in whom we had confidence; otherwise we should not have made the agreement. There is nothing to limit the liability of the executors to the estate of their testator, and they are personally liable. We did not intend to admit anybody who might happen to be an executor. We intended to have an agreement with three people, not with two. If a contrary construction is put on the agreement, we have a right to set it aside on the ground of surprise.

Mr. *Creed*, for *W. B. Greenfield*, took no part in the argument.

SIR W. M. JAMES, L.J.:—

I really am unable to concur in the decision of the Vice-Chancellor.

It appears to me, first of all, that the testator being at the time of his death a contractor, his estate became in equity (whatever it was at law) a co-contractor in the business. The result is, that unless there are some circumstances to induce the Court of Equity, on some particular equitable ground, to interfere with the ordinary consequences of such a contract, the executors became entitled to share in the profits of the contract, if there were any profits, and became liable to share the losses arising out of the contract, if there were losses, and that the executors are entitled

(1) Law Rep. 14 Eq. 427.

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to have the claims and liabilities ascertained in the only mode in which they can be ascertained—that is to say, by having the contract completed, and seeing, at the end of the contract, what is the result as to profit or loss.

I really cannot distinguish this case, either in principle or in its circumstances, from the case, which was suggested during the argument by the Lord Justice, of four persons engaged in a contract for the purchase of a cargo of cotton, or of any other commodity, which had not been wholly delivered at the time of the death of one of them; and surely in such a case the transaction would have to be completed, and the profit or loss upon it would then be received or paid by the executors.

That being our opinion, it may not be very material to determine the other point as to the agreement; but still I think it right to do so; and when we read it, and know the circumstances under which it was made, I cannot really bring myself to entertain a doubt that it was an agreement between the then surviving contractors and the persons, whoever they were, who represented the co-contractor who was dead. It is beyond all question that at that time his will was not proved, and it is beyond all question that it was not even ascertained what trustees had accepted or would accept, or what executors had proved, or would prove, or would survive to prove. Then under that state of things the agreement was prepared. [His Lordship then read the recitals of the agreement.] The agreement recites that "the parties hereto are jointly interested as co-contractors." And who are the parties of whom alone it could be averred that they were co-contractors, or jointly interested? Why, the representatives of the deceased testator. It was not any person named as trustee or executor in the will who would have anything to do with it, because, for example, an executor who did not prove or accept the trust never could have been meant to be described as a person jointly interested with the other contractors. Then the agreement is that the contract is to be carried out on the joint account of the co-contractors, and in the best interests of all concerned in the contract. All the co-contractors are to contribute in equal shares towards the expenses of carrying it out—that is to say, the contract is to be carried out on the joint account of the surviving contractors, and of the estate of

the deceased co-contractor, in the best interests of all concerned in the contract. The individual persons named as executors and named as trustees would have no personal interest whatever in the contract, and would have no reason whatever to say anything to it. Then who are the persons who are to contribute? The contractors are to contribute in equal shares. It does not mean that the seven persons are to contribute in equal shares, but that the four and the estate are to contribute in equal shares, the estate being one of the co-contractors. The agreement then provides that, for the convenience of the others, the executors and trustees of the will are only to be sleeping partners—that is to say, the estate is to be a sleeping partner, and no one of the executors is to have a right to actively intervene in the execution of the works, but will simply have an interest in the profits or a liability in respect of losses.

Then we have the provision as to the death of another of the co-contractors. His personal representatives would not be partners who were selected by reason of their fitness or personal responsibility, but would be there simply in the character of personal representatives. There is the further provision that "the agreement is to be binding as between themselves upon the parties whose signatures are hereto annexed"—they were all ascertained, and were all ready to sign—and it is to be binding "upon the executors and trustees of *Robert William Kennard* as soon as they have signed" it—that is to say, it is to be binding on the persons who, at the time of the signature, would be the executors and trustees of *Robert William Kennard*. I am of opinion that, if the agreement was signed by the persons who were intended to sign, it thereupon became binding on all the other partners.

I must say I think that a great deal of time has been occupied in pressing on us matter which, in my opinion, is utterly inadmissible as evidence. What the intentions of the Plaintiffs were, what they thought or believed, or what conversations took place, seem to me to be utterly inadmissible when once we have got a written document, and have got the facts which were existing at the time when that written document was entered into; and it would be utterly unsafe in the dealings of mankind if any one could be relieved from the effects of a document which he has signed by saying that he had received some information that some-

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body else would have been bound by it, and that that was the great inducement to enter into the contract. The whole of that evidence is, in my mind, legally inadmissible, and even if admissible, seems to me to have not the slightest weight whatever.

I am of opinion, therefore, that the decree of the Vice-Chancellor ought to be reversed, that is to say, we must declare the agreement to be valid and binding, and declare that the estate of *Robert William Kennard* is entitled to share in the profits and benefits of the contract, and is also liable for the losses arising therefrom; and that the Plaintiffs must pay the costs of the suit, except of course those of the appeal.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

The testator, *Robert William Kennard*, and four other persons, signed a contract with the Government of *Egypt* to build a harbour at *Alexandria*. Some slight proceedings had taken place towards carrying out the contract, and in that position *Robert William Kennard* died. Now the first question is, what was the effect of his death? I am of opinion that though it is quite true that at law the right to bring an action on the contract, and the liability to be sued on the contract, was in the survivors, yet it is quite clear that even at law, and much more in equity, the benefit of the contract and the liability under the contract, as between the executors of the deceased partner and the surviving partners, continued notwithstanding the death of *Robert William Kennard*. Mr. Justice *Williams* says (1): "The general rule is, that the interest which the testator had in a *chose in action* jointly with another shall not pass to his executor, yet *per legem mercatoriam*, as formerly mentioned, an exception was established in favour of merchants, which has been extended to all traders and persons engaged in joint undertakings in the nature of trade. But in these cases, although the right of the deceased partner devolves on his executor, it is now fully settled that the remedy survives to his companion, who alone must enforce the right by action, and will be liable, on recovery, to account to the executor or administrator

(1) *Williams* on Executors, 6th Ed. p. 789.

for the share of the deceased." Those, then, are, in my opinion, the respective rights of the executors of *Robert William Kennard*, who is dead, and of his surviving partners; and if no bill had been filed and no agreement entered into, and the contract had been completed, no one would doubt that his executors could have filed a bill in this Court to have an account of the profits earned in the transaction, and to have them paid over to them.

I have not found any sufficient authority cited to convince me that a Court of Equity would interfere with the carrying out of a contract of this description, and oblige the executors to accept a valuation instead of taking the profit which may arise from carrying out the contract. The only case that has been cited in favour of that proposition was a case of *Ambler* v. *Bolton* (1), but in my opinion that case is no authority for that proposition. There was in that case a running contract with the Postmaster-General for carrying the mails, which was liable to be terminated at a particular time, or which might last for a further time if both parties were willing, and it is obvious that in such a case the consideration can be measured, and it can be found what the profits for a particular time would be. Then the question was whether the surviving partner would be obliged to determine it, and the Master of the Rolls said that he was at liberty to go on with it, or to determine it, as he liked. It might be that in a case of that kind the most convenient way of judging of the rights of the parties was to make a valuation of what in fact were their shares in the goodwill of that contract, but where the contract is one of this nature, for performing one specific work, I cannot see how the profits can be ascertained except by letting the contract be carried on, and then finding out what the profits actually are.

Then comes the second question, as to what is really the effect of the agreement. I agree with what the Vice-Chancellor said, that according to the evidence the parties differed as to what they intended. But the Court cannot consider what the parties say they intended. The question really is, what is the legal effect of the agreement? The Vice-Chancellor thought that this agreement professed to be by all the executors and all the trustees of *Robert William Kennard*, and that because one who had been named a

(1) Law Rep. 14 Eq. 427.

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trustee had not signed, therefore the agreement had not been signed by all the parties who were intended to sign it. But in my opinion that is not the true construction of the agreement.

Let us first look at what the circumstances were at the time when the contract was entered into. *Robert William Kennard* had left three executors, but none of them had proved; he had left three trustees, but they had not acted. I cannot help thinking that Sir *William Drake* certainly knew, and I think it must be taken that the parties did know, that there was a doubt as to who the persons would be who would ultimately become his executors and trustees. In that state of things they entered into this agreement, leaving a blank for the names of the executors and trustees, but describing the persons, whoever they might turn out to be, as "executors and trustees of the will of the late *Robert William Kennard*." Then the agreement recites that "the parties are jointly interested as co-contractors," and it is quite obvious that the persons who were really interested as far as the estate of *Robert William Kennard* was concerned were his executors and trustees, whoever they might be, and that if a person, though appointed executor, renounced, that person would have no interest at all. Then it goes on to say that the contract is to be carried on upon the joint account, and then it says that the executors and trustees of the will of the late *Robert William Kennard* are to be sleeping partners. I agree that that goes strongly to shew that the object was simply to bind the executors and trustees, whoever they might be, so as to have the estate bound. Then the provisions for the event of the death of any of the acting partners shew in what position they really intended the executors and trustees to stand.

No doubt, in point of law, by signing this agreement the executors make themselves personally responsible, but it is plain to my mind that the object of the other parties was to get the estate bound, and, providing *Robert William Kennard's* estate was bound, their object was satisfied.

Then there is the last provision, that the agreement is to be binding as between themselves upon the parties whose signatures were annexed as from the date thereof, and upon the executors and trustees of Mr. *Robert William Kennard* as soon as they had

signed the same. Therefore it is plain that they intended first of all to bind themselves *inter se* whether those executors or trustees signed or not; and it is plain that they knew that some little time would elapse before the executors and trustees would sign. But if the persons who were intended to be bound were those who were named as executors and trustees of the will, there was no reason why they should not sign at once. Why were their names not set down, and why did they not sign it at once? It is plain the reason was that the parties knew, and Sir *William Drake* says he knew, that it was uncertain who would ultimately turn out to be the executors and trustees, and therefore time was to be given in order that it might be ascertained who should turn out to be the executors and trustees, and then the persons so ascertained were to sign.

In my opinion that is the true construction of the agreement, and we must collect what was the intention of the parties from what they have said in the agreement itself.

Even if it was admissible, we ought not to attend to evidence —not that the partners were deceived by any representations made to them by the *Kennards* or by anybody else—but simply that they had put a particular construction on the agreement. It is impossible that a party can get free from an agreement which he has signed by saying he thought it meant something different to that which it does mean. I therefore entirely agree that the bill should be dismissed with costs.

Solicitors for the Plaintiffs: Messrs. *Bircham & Co.*

Solicitors for the Defendants: Messrs. *Collette & Collette;* Mr. *F. C. Greenfield.*

L. JJ.
1874
Feb. 23, 24.

MENIER *v.* HOOPER'S TELEGRAPH WORKS.

[1873 M. 169.]

Company—Majority—Minority—Shareholders—Pleading.

Where the majority of a company propose to benefit themselves at the expense of the minority, the Court may interfere to protect the minority.

In such a case, the bill is rightly filed by one shareholder on behalf of the others and against the company.

Order of *Bacon*, V.C., affirmed.

THE bill in this case was filed by *E. J. Menier*, on behalf of himself and all other the shareholders of the *European and South American Telegraph Company* (except such of them as were Defendants), against a company called *Hooper's Telegraph Works*, *W. Hooper*, *H. W. Crace*, and the *European and South American Telegraph Company*, and stated (amongst other things) as follows:—That the *European Company* was incorporated in 1871 with the object of carrying out an agreement between the Plaintiff, *Menier*, and one *Bradford*, and others, for constructing a submarine telegraph from *Europe* to *South America*, under certain conventions and decrees of foreign governments. The capital of the company was to be £1,250,000, in 62,500 £20 shares, and by the articles of association provisions were made for holding meetings of the company, at which every member was to have one vote for every share held by him. That *Hooper's Company* were to make and lay down for the *European Company* telegraph cables from *Portugal* to *Brazil*. That a prospectus was issued and many shares were applied for, but in consequence of objections raised the directors determined not to proceed with the allotment to the public, and the only shares allotted were 3000 to *Hooper's Company*, 2000 to the Plaintiff, and 325 to thirteen persons, ten of whom were the directors. That £3 was paid on each of the shares so allotted. That one of the concessions for making the telegraph had been granted to the Baron *de Maua*, who was at one time chairman of the *European Company*, and this concession was claimed by the *European Company*. That a bill was filed in this

Court by the *European Company* against the Baron *de Maua* and another company, praying a declaration that the Baron *de Maua* was a trustee of the concession for the *European Company*, and that he might be restrained from transferring it to any one else. That a motion was made for an interlocutory injunction, and was refused by the Vice-Chancellor *Malins*, but on the balance of convenience only. That the *European Company*, and also *Hooper's Company*, at first intended to appeal against the order of the Vice-Chancellor *Malins*. That *Hooper's Company* afterwards determined not to appeal, and then the directors of the *European Company* determined not to appeal, but to take steps for winding up the *European Company*. That the Plaintiff was resident in *Paris* and ignorant of English law, and believed that any arrangements adopted by the directors would be for the benefit of the *European Company*, and not exclusively in the interests of *Hooper's Company*. That the Plaintiff wished the appeal to proceed, and offered to bear the costs. That on the 12th of February, 1873, an extraordinary meeting of the *European Company* was held, at which a resolution was passed that the company be wound up voluntarily, and that the Defendant *Crace* be the liquidator. That the resolution was proposed by one *Kennedy*, a director of *Hooper's Company*, and that *Crace* was secretary of *Hooper's Company*. That this resolution was confirmed at another extraordinary meeting, at which five persons only were present, of whom three were directors nominated by *Hooper's Company*, and one was *Crace*, the secretary. That the Plaintiff protested against these proceedings. That the Plaintiff was then ignorant, but had since discovered, that these proceedings took place through the influence of *Hooper's Company*. The bill then stated the circumstances of an arrangement between *Hooper's Company* and the *Telegraph Construction and Maintenance Company* and the Baron *de Maua*, under which it would be to the advantage of *Hooper's Company* that the agreement between them and the *European Company* should be put an end to, in order to benefit Baron *de Maua's Company*, and in order that *Hooper's Company* might sell to another company the cable they were making for the *European Company*. That these arrangements were concealed from the Plaintiff and the other shareholders in the *European Company*. That *Hooper's Company* procured the abandonment of the

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suit against the Baron *de Maua*, and the winding-up of the *European Company*, through the influence which they had as holders of 3000 shares in the *European Company*, and through the influence of the directors nominated by them.

And the bill prayed that *Hooper's Company* might be declared not entitled to the benefit of the profits derived from the abandonment of the suit and other arrangements aforesaid, and might be declared a trustee of those profits for the Plaintiff and the other shareholders in the *European Company;* and that the *European Company* and the Defendants might be restrained from repaying to *Hooper's Company* any of the money paid on the allotment of shares in the *European Company*, and from disposing of the property of the *European Company*.

To this bill the Defendants *Hooper's Company* and *W. Hooper* demurred for want of equity; and the Defendants *Crace* and the *European Company* also demurred, and for cause of demurrer shewed that the Plaintiff had not made out such a case as entitled him to discovery or relief.

The Vice-Chancellor *Bacon*, on the 12th of January, 1874, overruled both demurrers; and the Defendants appealed.

Mr. *Fry*, Q.C., and Mr. *Millar*, for *Hooper's Company*:—

A shareholder has a right to vote as he pleases, and to suit his own interests. If not, the Court in every case might have to interfere wherever there was a small majority, and consider what were the motives of each shareholder. If there was a suit by the company against any individual shareholder, he would not be disabled from voting. He is not a trustee for any one, and he may vote against the interests of the company or of any of the other shareholders. No constructive trust can be raised: *Gray* v. *Lewis* (1). In *Atwool* v. *Merryweather* (2) the vote was impeached. If such a suit can be maintained, one shareholder may file a bill to have a certain contract set aside, and another to have it carried on. Such a suit can only be maintained by the company against the directors. At all events, the proceedings ought to be in the liquidation, and not by bill.

(1) Law Rep. 8 Ch. 1035. (2) Law Rep. 5 Eq. 464, n.

(a) See W.N. (1874) 5. 22 & 25.

Mr. *Kay*, Q.C., Mr. *Jackson*, Q.C., and Mr. *Everitt*, for the Plaintiff, were not called upon.

SIR W. M. JAMES, L.J.:—

I am of opinion that the order of the Vice-Chancellor in this case is quite right.

The case made by the bill is very shortly this: The Defendants, who have a majority of shares in the company, have made an arrangement by which they have dealt with matters affecting the whole company, the interest in which belongs to the minority as well as to the majority. They have dealt with them in consideration of their obtaining for themselves certain advantages. *Hooper's Company* have obtained certain advantages by dealing with something which was the property of the whole company. The minority of the shareholders say in effect that the majority has divided the assets of the company, more or less, between themselves, to the exclusion of the minority. I think it would be a shocking thing if that could be done, because if so the majority might divide the whole assets of the company, and pass a resolution that everything must be given to them, and that the minority should have nothing to do with it. Assuming the case to be as alleged by the bill, then the majority have put something into their pockets at the expense of the minority. If so, it appears to me that the minority have a right to have their share of the benefits ascertained for them in the best way in which the Court can do it, and given to them.

It is said, however, that this is not the right form of suit, because, according to the principles laid down in *Foss* v. *Harbottle* (1), and other similar cases, the Court ought to be very slow indeed in allowing a shareholder to file a bill, where the company is the proper Plaintiff. This particular case seems to me precisely one of the exceptions referred to by Vice-Chancellor *Wood* in *Atwool* v. *Merryweather* (2), a case in which the majority were the Defendants, the wrong-doers, who were alleged to have put the minority's property into their pockets. In this case it is

(1) 2 Hare, 461. (2) Law Rep. 5 Eq. 464, n.

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right and proper for a bill to be filed by one shareholder on behalf of himself and all the other shareholders.

Therefore the demurrer ought to be overruled.

SIR G. MELLISH, L.J.:—

I am entirely of the same opinion.

It so happens that *Hooper's Company* are the majority in this company, and a suit by this company was pending which might or might not turn out advantageous to this company. The Plaintiff says that *Hooper's Company* being the majority, have procured that suit to be settled upon terms favourable to themselves, they getting a consideration for settling it in the shape of a profitable bargain for the laying of a cable. I am of opinion that although it may be quite true that the shareholders of a company may vote as they please, and for the purpose of their own interests, yet that the majority of shareholders cannot sell the assets of the company and keep the consideration, but must allow the minority to have their share of any consideration which may come to them. I also entirely agree that, under the circumstances, the suit is properly brought in the name of the Plaintiff on behalf of himself and all the other shareholders.

The appeal will be dismissed with costs.

Mr. *Fooks*, Q.C., and Mr. *Davey*, for the other Defendants, then submitted to have their appeal dismissed.

Solicitor for the Plaintiff: Mr. *J. Harwood.*

Solicitors for the Defendants: Messrs. *Wilson, Bristows, & Carpmael.*

In re PARAGUASSU STEAM TRAMROAD COMPANY.

L. JJ.
1874
Feb. 25.

FERRAO'S CASE.

Contributory—Paid-up Shares—Payment—Compromise—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Payment of Costs by Official Liquidator.*

An action was brought against a company formed before the passing of the *Companies Act*, 1867, and the company submitted to judgment for a sum of money, part of which was to be paid by crediting a certain shareholder with a sum sufficient to make his shares fully paid up. An order was soon afterwards made for winding up the company:—

Held, that the shareholder was not a contributory in respect of these shares as not fully paid:

Held, also, that the case did not come within the provisions of the *Companies Act*, 1867, as to paid-up shares.

Order of *Bacon*, V.C., affirmed.

When an application of an official liquidator is refused with costs, the order will be that the official liquidator do pay the costs.

THE *Paraguassu Steam Tramroad Company* was, on the 9th of January, 1867, incorporated under the *Companies Act*, 1862. Mr. *Ferrao* applied for, and was allotted, fifty £20 shares, which were duly registered in his name, and on each of which he paid calls amounting to £6.

In 1869 the company was in difficulties, and Mr. *Webb*, the engineer of the company, brought an action against the company for a large sum of money. This action was compromised, and a Judge's order was made by consent; the terms being that the company were to pay Mr. *Webb* £3900, whereof £3200 was to be paid by bills of exchange, and the company were to credit the fifty shares standing in the name of Mr. *Ferrao* with £700, so as to make the same fully paid up. Entries to that effect were accordingly made in the books of the company. On the 20th of August, 1869, an order was made for winding up the company.

The official liquidator applied to have Mr. *Ferrao* placed on the list of contributories in respect of these fifty shares, on which £300 only was to be considered paid. *Webb* in his evidence stated

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that Mr. *Ferrao* was a friend of his, but he did not owe Mr. *Ferrao* any money.

The Vice-Chancellor *Bacon* refused the application (1), and the official liquidator appealed.

Mr. *Jackson*, Q.C., and Mr. *Ingle Joyce*, for the official liquidator:—

No debt was due by the company to *Ferrao*, and the case is therefore not like *Spargo's Case* (2), or *Maynard's Case* (3). No one has paid the calls on these shares in cash, nor has there been accord and satisfaction of any liability. The company was known to be in difficulties and unable to pay *Webb*, and this was a mere scheme. *Webb* was paid nothing; he got only bills, and the company had no right to make such an arrangement. This case is one of those which are provided against by the 25th section of the *Companies Act*, 1867. It is true that this company was formed before the passing of the Act, but this enactment, like many in that Act, applies to all companies whenever formed.

Mr. *Kay*, Q.C., and Mr. *Cracknall*, for Mr. *Webb*, were not called upon.

(1) 1874. Jan. 12. W.N. (1874) 5.

SIR JAMES BACON, V.C., said that whether the 25th section of the Act of 1867 applied or not, although he had no doubt that it did apply, what had taken place seemed to him to amount to payment, and to payment in cash. His Honour then stated the facts, and said that this case was free from all the dangers which the 25th section was intended to provide against. The policy of the law was, that when a man had undertaken to take shares, and, as a consequence, to pay calls upon those shares, the creditors should not be disappointed by any collateral arrangement made between the directors and the person so liable unless the contract should be registered in the manner prescribed by the Act. But the Act was merely a continuation of the law, and it was not necessary to say that it had any retrospective operation. It took up the law as it stood, and speaking of companies and the liabilities of shareholders, enacted that nothing short of payment in cash should satisfy the liability unless the contract upon which it was founded should be registered. This case did not come within the reach of that section in the slightest degree. If *Webb* had taken the whole sum which they were bound to pay him and handed it to *Ferrao*, and he had paid the calls, nobody could dispute that there was a payment in cash. What was done was equivalent in every respect, and the creditors of the company were not injured. His Honour was of opinion that *Ferrao's* liability was discharged; and the summons must be dismissed with costs.

(2) Law Rep. 8 Ch. 407.

(3) *Ante*, p. 60.

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FERRAO'S CASE.

SIR W. M. JAMES, L.J.:—

This case is really beyond all doubt, and if there was ever a case of payment this seems to me to be such.

A gentleman named *Webb*, having a claim against a company, brought an action against them for many thousands of pounds. It was arranged between them that the action should be settled on terms that he was to receive £3900 as a liquidated sum. He agreed with the company that he would take part of that £3900 in £700 to be paid by crediting with that sum Mr. *Ferrao*, a friend of his whom he felt bound to oblige. The £700 was written off as between the company and *Webb*, and was written off on the other side as between the company and Mr. *Ferrao*. That was the point on which the Vice-Chancellor decided this case, and on that point we affirm it. The Vice-Chancellor seems to have assumed that the 25th section of the Act of 1867 would have applied to this case. As at present advised, I do not think I should agree with that assumption. It was not argued before the Vice-Chancellor, but certainly as at present advised I do not see how that section could apply to such a case as this.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Webb having brought an action against the company, that action is settled by a Judge's order. [His Lordship then stated the effect of the order.] In my opinion, the moment the company, in pursuance of that Judge's order, did credit the shares of *Ferrao* with the £700 so as to make them fully paid-up shares, that moment the £700 was paid by the company to *Webb* just as much as if it was paid in cash. Whether the bills amounted to payment or not it is wholly unnecessary to consider, but that part of the £3900 which was to be paid by crediting *Ferrao* with £700 became paid as soon as the company had credited him with that sum.

Then, if it became paid by the company to *Webb*, it obviously follows that the £700 was also paid by *Ferrao* to the company, because crediting means acknowledging that they had received that amount in cash. It is exactly the same thing as if *Webb* had gone to the company and the company had handed over to *Webb* £700 in bank notes, and then *Webb* had said, "I wish to pay up the

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shares of my friend *Ferrao*; there is the £700 in bank notes back again." There was no need to go through that form; and, in my opinion, writing it off in the books is perfectly equivalent to payment.

I also agree with what the Lord Justice has said upon the other point, and, as at present advised, I doubt extremely whether this case comes within the 25th section of the Act of 1867.

The appeal will be dismissed with costs, to be paid by the official liquidator.

THEIR LORDSHIPS said further, in answer to Mr. *Kay*, that such would be the order in similar cases; the intention being that the liquidator was to pay the costs, whether he did or did not get them out of the estate.

Solicitors: Messrs. *Wansey & Bowen;* Messrs. *Whitakers & Woolbert.*

L. JJ. 1874 *March* 7.

BIRD *v.* BIRD'S PATENT DEODORIZING AND UTILIZING SEWAGE COMPANY.

[1872 B. 44.]

Company—Agreement to assign the Assets to a Promoter of a New Company—Ultrà vires—Companies Act, 1862, *s.* 161.

The directors of a company entered into an agreement with *A.* to sell him the business and assets of the company, upon the terms that the directors should forthwith call an extraordinary meeting and endeavour to get the sanction of the shareholders to the carrying out the sale, and that on such sanction being obtained he should pay the directors £250 in cash, and if he should succeed in establishing a new company for the same purpose, should, within three months from the allotment of shares, pay a further sum of £1250 in cash, and £2000 in fully paid-up shares of the new company. The company, at an extraordinary general meeting, passed a resolution for affixing the seal of the company to the agreement, which was done, and *A.* paid the £250:—

Held, on bill by a dissentient shareholder (affirming a decree of *Bacon*, V.C.), that the agreement was *ultrà vires* and invalid, and that effect could not be given to it under sect. 161 of the *Companies Act*, 1862, for that that section only authorizes a sale to a company, not to a person about to form a company.

THIS was an appeal by the Defendants, except *Charles Allsop*, from a decree of Vice-Chancellor *Bacon*, declaring an agreement

for sale of the whole property and business of the company to be invalid.

The company was formed in March, 1866, with a nominal capital of £5000, divided into £10 shares, for the purpose of purchasing and working a patent of the Plaintiff for improvements in treating sewage.

Clause 43 of the articles of association was as follows:—

"With the sanction of an ordinary or extraordinary general meeting, but not otherwise, the directors may absolutely sell and dispose of or demise any lands, buildings, contracts, works, or processes belonging to, entered into, or carried on by the company, and with such sanction may dispose of or grant any license or licenses to use any letters patent the property of the company."

The Plaintiff, by deed dated the 21st of April, 1866, assigned his patent to the company, in consideration of his having twenty fully paid-up shares in the company allotted to him. These shares were accordingly allotted to him, and remained standing in his name.

On the 16th of October, 1871, the directors of the company entered into the following agreement:—

"Memorandum of agreement made the 16th of October, 1871, between [names] directors of *Bird's Patent Deodorizing and Utilizing Sewage Company*, hereinafter called the vendors, of the one part and *Charles Allsop*, of, &c., hereinafter called the purchaser, of the other part:

"Witnesseth that the vendors for and on behalf of the said company, and so far as they have power to bind the same, agree to sell and assign, and the purchaser agrees to purchase, all the assets, patents, patent rights, works, leases, premises, stock-in-trade, book-debts, business, goodwill and connection, property and effects of the said *Bird's Patent Deodorizing and Utilizing Sewage Company*, as and from the date hereof, such sale and purchase to be for the consideration and under and subject to the several conditions and stipulations hereinafter contained.

"1. The vendors shall forthwith, in accordance with the regulations contained in the memorandum and articles of association of the said company, call an extraordinary meeting of the share-

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holders of the said company, and shall use their best endeavours in obtaining the sanction of the shareholders enabling them to carry out such sale and purchase, and shall, if necessary, endeavour to obtain the voluntary liquidation and dissolution of the said company.

"2. On such sanction being obtained the purchaser shall deposit with the vendors the sum of £250 in cash, and if the purchaser shall, with the assistance of the vendors (as hereinafter provided for), succeed in promoting and constituting a new company for working the said patent, he shall, within three months from the allotment of shares in such proposed new company, pay to the vendors or their nominees a further sum of £1250 in cash, and a sum of £2000 in fully paid-up shares in such new company.

"3. And the purchaser agrees to use his best endeavours to form, constitute, and promote such proposed new company, and the vendors agree to assist him, by all means in their power, in promoting and constituting such proposed new company, and, if necessary, in liquidating and dissolving the old company."

The agreement was signed by the directors, and, notwithstanding the repeated protests of the Plaintiff, an extraordinary general meeting of the company was held on the 8th of November, 1871, at which the following resolution was carried:—

"That all the buildings, works, contracts, patents, and premises belonging to, entered into, or carried on by this company, be sold and transferred to *C. Allsop*, Esquire, of *Salterdown, Muswell Hill*, gentleman, upon the terms and stipulations and for the considerations mentioned and set forth in an agreement or document dated the 16th of October, 1871, between the directors and the said *C. Allsop*, now read to this meeting, and that the seal of the company be accordingly attached thereto."

The seal of the company was accordingly affixed to the agreement, and *Allsop* paid the £250.

On the 24th of November, 1871, the directors sent to the shareholders a notice that on the 9th of December, 1871, an ordinary general meeting of the company would be held, at which special resolutions in the terms therein mentioned, being substantially the

same terms as those of the resolutions set forth below, would be proposed.

On the 5th of December the Plaintiff gave notice that if the resolutions relating to the sale to *Allsop* were carried, he should file a bill to restrain the transfer.

The resolutions passed at the meeting on the 9th of December, 1871, were—

"1. That the resolution unanimously passed at the meeting of the 8th of November last, for the sale of the company's property to Mr. *Allsop* upon the terms of the provisional agreement of the 16th day of October last (now again read to this meeting), be and the same is hereby confirmed.

"2. That this company be wound up voluntarily.

"3. That Mr. *H. W. Williams*, of *Cheltenham*, accountant, be appointed liquidator.

"4. That the liquidator be empowered, authorized, and requested to notify, act upon, and carry out the resolutions passed at the extraordinary general meeting on the 8th of November last and this day confirmed, and to complete and conclude the sale of the company's property to Mr. *Charles Allsop* upon the terms of the provisional agreement of the 16th day of October last (now again read to this meeting), or upon such other or modified terms as the said liquidator may in his own discretion agree with the said *C. Allsop*."

On the 29th of December, 1871, the directors sent to the Plaintiff and the other shareholders a notice that a meeting would be held on the 5th of January, 1872, to confirm such of the above resolutions as might require confirmation, to the intent that they might become special resolutions within the meaning of the *Companies Act*, 1862. The meeting was held, but the resolutions as to winding-up were not confirmed, and they were subsequently abandoned, because, as the directors stated, *Allsop* considered that the winding-up of the old company would be prejudicial to the new one. The Plaintiff filed his bill on the 7th of February, 1872, against the company, the directors, and *Allsop*, and prayed a declaration that the agreement of the 16th of October, 1871, and the resolutions for carrying it into effect, were *ultrà vires* and

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invalid, and that the agreement might be given up to be cancelled, and that the company and directors might be restrained from carrying the agreement into effect, and particularly from assigning the patent, property and assets of the company to *Allsop*, and that *Allsop* might be decreed to account for all profits derived by him from the patent, and from working the company's business under the agreement.

Vice-Chancellor *Bacon* made a decree declaring the contract *ultrà vires*, and granting an injunction as prayed, and ordered *Allsop* to repay the £250, and the directors to pay the Plaintiff's costs.

Mr. *Kay*, Q.C., and Mr. *Millar*, for the Appellants:—

The object was to act under sect. 161, as in *In re Irrigation Company, Ex parte Fox* (1). The agreement does not purport to bind the company, but it was adopted by unanimous resolution at the meeting of the 8th of November, 1871. It was only an agreement to sell to a new company when formed, and could only be carried into effect by winding-up. The winding-up was only dropped for a time, in order not to interfere with the formation of the new company. The injunction prevents the sale from being carried into effect at all.

[The LORD JUSTICE JAMES:—On payment of the £250 the property was to pass.

The LORD JUSTICE MELLISH:—The company having sealed the agreement, became liable to be sued at law upon it.]

The issue raised by the bill is whether the agreement was provident or improvident. The evidence shews it to have been provident, and the company ought not to be stopped from carrying it out by means of sect. 161.

Mr. *Eddis*, Q.C., and Mr. *S. Dickinson*, for the Plaintiff:—

Sect. 161 applies only where it is proposed to sell to a new company—an existing company. There must be a new company before the resolution to sell is passed. The sale cannot be to a person who undertakes to form a new company. Under the agreement,

(1) Law Rep. 6 Ch. 176.

Allsop might make any terms he pleased with the new company. Apart from sect. 161, the sale is *ultrà vires*. The decree does not affect the powers of the liquidator to sell under sect. 161. The Defendants were proceeding under the agreement, not under the statute.

Mr. *Millar*, in reply:—

The agreement is merely provisional, and no sufficient reason is shewn for preventing the company from taking the requisite steps to carry it legally into effect. Such an agreement may be made antecedently to the winding-up.

SIR W. M. JAMES, L.J.:—

I am of opinion that the order of the Vice-Chancellor ought to be affirmed. When the matter comes to be inquired into, it appears to me that the company were wrong altogether in the original agreement, as an agreement to be carried into effect by means of a winding-up. Under sect. 161, the liquidator could not have sold the property to *Allsop*, and that section is the only one which gives power to bind dissentient shareholders by a transfer of the company's business. It was not proposed here to sell or transfer to a new company, but to an individual who was to be a speculator in the matter, and was to be at liberty to make such profit as he could by the formation of a new company. A dissentient shareholder has a right to something more than what he gets under this agreement. The proposal is to sell to any company that *Allsop* may get together. The arrangement was at one time treated as something intended to be carried out under a winding-up; but it appears that the directors dropped this, and were proceeding to carry it out under their own powers, without any reference to winding-up. The statements in their answer as to what they intended to do are very ambiguous. They now say they mean to carry out the arrangement by means of a winding-up, but I am not satisfied that they intended to do so before the bill was filed. The company ought to have submitted to an injunction as soon as the bill was filed, and then to have put themselves right by passing proper resolutions. The appeal must be dismissed with costs.

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SIR G. MELLISH, L.J.:—

I am of the same opinion. I have come to the conclusion that the agreement was not valid as a preliminary agreement for winding up the company and selling its assets to another company. I think that according to the terms of sect. 161 the sale must be a direct one from one company to the other. This is an agreement for a sale to *Allsop*. A meeting was called, which professed to confirm the agreement and make it a binding agreement, independently of winding-up. The deposit of £250 was paid by *Allsop*. No doubt a new company was to be formed for working the patent, but *Allsop* was to remain the purchaser, and he was left to make any bargain he pleased for the sale of the assets to the new company. In my opinion that is not a valid arrangement within the meaning of sect. 161. I think that the decree has rightly declared the agreement to be *ultrà vires*, and restrained the company from carrying it out.

The decree will not restrain them from carrying out a sale of their business regularly under sect. 161.

Solicitors: Messrs. *Waterhouse & Winterbotham*; Messrs. *Valpy & Chaplin*.

L. JJ. 1874 *March* 10, 11, 12.

SAULL *v.* BROWNE.

[1872 S. 237.]

Answer—Insufficiency—Discovery before Title is established.

6 Ch D. 644
7 Ch D. 440
18 Ch D 482
20 Ch D 522

The Plaintiff filed her bill to establish that a business carried on by three of the Defendants in partnership belonged to the estate of her late husband, having been commenced and carried on with assets which the first two of them, who had carried on her husband's business in partnership with her till they commenced the new business, had abstracted from the old business. The interrogatories required these Defendants to set forth whether they, or any of them, had drawn out of the new business any money for their or his own account in respect of capital advanced, profits, or otherwise, and to set forth the particulars of the moneys so drawn out. The third Defendant declined to answer this interrogatory, submitting that the Plaintiff was not entitled to this discovery till she had established her right to a decree:—

Held (affirming the decision of the Master of the Rolls), that the interrogatory must be answered.

THIS was an appeal by the Defendant *Findlay* from an order of the Master of the Rolls allowing exceptions to his answer.

Thomas Saull, a wine and spirit merchant, carrying on business in *Aldersgate Street*, died in 1855, leaving a will by which he directed his trustees and executors to permit his wife, the Plaintiff, *Sarah Saull*, and his son, the Defendant *William Devonshire Saull*, during the life of *Sarah Saull*, to carry on the testator's business, and to use for that purpose such parts of his estate as were employed therein at his decease, *W. D. Saull* receiving £200 a year for his services. The Plaintiff and the Defendant *William Saull* were the sole acting executors and trustees.

The bill alleged that till 1858 the testator's business was carried on according to the above directions in his will, and that in that year *William Saull*, under strong pressure, induced the Plaintiff to admit the Defendants *Browne* and *Godfrey* as partners for fourteen years from the 1st of January, 1858, on the terms contained in a deed by which the Plaintiff was made a sleeping partner, and *Browne* and *Godfrey* the managing partners.

In May, 1872, *Browne* commenced carrying on business as a wine and spirit merchant in *Worship Street*, under the firm of *W. J. Browne & Co.*, and in June, 1873, a partnership deed was executed by which *Browne*, *Godfrey*, and *Findlay* agreed to carry on the same business in partnership under the same firm.

The case made by the bill was that, at or about the termination of the partnership formed in 1858, *Godfrey* and *Browne* arranged a scheme for transferring the testator's business and the goodwill thereof from the *Aldersgate Street* premises to the *Worship Street* premises for their own benefit, and that the *Worship Street* business was commenced and had been carried on with moneys which *Godfrey* and *Browne* had from time to time improperly, and without the knowledge or privity of the Plaintiff, drawn out and transferred from the *Aldersgate Street* business, and by means of the improper withdrawal of customers from, and the appropriation of the goodwill of, the *Aldersgate Street* business; and that by means of various contrivances alleged in the bill *Godfrey* and *Browne* had substantially effected a complete transfer of the *Aldersgate Street* business and its assets to the *Worship Street* business, or the firm of *W. J. Browne & Co.*, and that *Findlay* had notice of this when he joined that firm.

The bill went on to allege that *Godfrey*, *Browne*, and *Findlay*,

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trading under the firm of *W. J. Browne & Co.*, had used and traded with the assets of the testator's business, and had appropriated the goodwill of such business, and had realised large profits thereby, and that the assets of the *Worship Street* business, and of the firm of *W. J. Browne & Co.*, constituted part of the testator's assets belonging to his said business, and that, under the circumstances, the *Worship Street* business and the goodwill thereof ought to be deemed and treated as belonging to the testator's estate, and that such of the Defendants *Godfrey*, *Browne*, and *Findlay*, as commenced and carried on the *Worship Street* business ought to be deemed and treated as having commenced and carried on, and as being possessed of, the same in trust and for the benefit of the testator's estate; and that the Defendants *Godfrey*, *Browne*, and *Findlay* ought to be decreed to account for all profits realised by the business, and to transfer the business and its assets as the Court should direct for the benefit of the persons interested in the testator's estate.

The bill, which was filed against *Browne*, *Godfrey*, *William Saull*, *Findlay*, and the *cestuis que trust* under the will of the testator, prayed for a declaration that the goodwill of the *Worship Street* business, and so much of the assets as represented assets removed from the *Aldersgate Street* business, and all profits arising from the use of the goodwill of the testator's business or the use of his assets, constituted part of the estate of the testator, *Thomas Saull*; and for accounts and inquiries to give effect to that declaration.

One of the interrogatories which *Findlay* was called upon to answer required the Defendants to set forth "whether the Defendants *Browne*, *Godfrey*, and *Findlay*, or any of them jointly have, or any of them separately has, drawn out of the business in the bill called the *Worship Street* business, or out of the assets of the partnership of *W. J. Browne & Co.* in the bill mentioned, any money for their or his own account either in respect of capital advanced, profits, or otherwise howsoever," and to set forth the particulars of all moneys drawn out, and distinguish such of the moneys so drawn out as were drawn out in respect of profits.

Findlay answered: "I am advised that, unless and until the Plaintiff shall have established her right to a decree in this suit, I am not compellable to answer the interrogatory relating to the

moneys drawn by the partners respectively from the said *Worship Street* business, or any part thereof; and I submit such question to the judgment of the Court accordingly."

The Plaintiff took thirteen exceptions to *Findlay's* answer—the first exception being, that he had not answered the above interrogatory. This exception, and all the others except the second and fourth, were allowed by the Master of the Rolls. *Findlay* appealed as regarded this and six other of the allowed exceptions.

Mr. *Marten*, Q.C., and Mr. *Russell Roberts*, for *Findlay*, in support of the appeal as to the first exception:—

Where a Plaintiff is seeking discovery which can be of no assistance to him in obtaining a decree, but is only of use in case he obtains one, and his title to any decree is disputed, the Court has a discretion as to whether it will order such discovery, and will be inclined to exercise this discretion in favour of the Defendant, if the ground for disputing the Plaintiff's title depends on a variety of circumstances, so that it is impossible for the Defendant to put in a plea: *Turney* v. *Bayley* (1); *De La Rue* v. *Dickinson* (2); *Carver* v. *Pinto Leite* (3); *Kettlewell* v. *Barstow* (4).

The LORD JUSTICE MELLISH:—According to *Elmer* v. *Creasy* (5) the discovery, though merely useful for the purposes of the consequential relief, will be ordered, unless it will be productive of unnecessary hardship on the Defendant to make him give it before decree.

Mr. *Locock Webb*, for the Plaintiff, was not called upon as to this exception.

SIR W. M. JAMES, L.J.:—

I am of opinion that this exception is properly taken, and that the Defendant is obliged to answer. The rule is quite clear, that a person answering is obliged to answer fully unless he can make out an exceptional case, viz., that the discovery is sought vexatiously or oppressively—or is discovery which it will be burdensome

20 L.J. 522.

(1) 4 D. J. & S. 332.
(2) 3 K. & J. 388.
(3) Law Rep. 7 Ch. 90.
(4) Ibid. 686.
(5) *Ante*, p. 69.

L. J.J. 1874 SAULL v. BROWNE.

or injurious to the Defendant to give, and which probably may never be used at all. The Court in such a case, as was said in *Elmer* v. *Creasy* (1), "may be trusted to exercise a proper control over any attempt on the Plaintiff's part to press for any such minuteness of discovery as would be either vexatious or unreasonable, as indeed it can do in every case in which it is satisfied that any kind of discovery is required vexatiously or oppressively." In the present case I am not satisfied that the discovery sought is immaterial, vexatious, or oppressive; and in fact it may, as it seems to me, be very material to the issue to be tried at the hearing. The case made by the Plaintiff is this: I was interested in a particular business; the assets and proceeds of that business have been, by a contrivance of my partners, transferred to another business in such a way as to entitle me to treat that new business as the business in which I was interested, or to treat some parts of its assets or proceeds as belonging to the business in which I am interested or entitled to share. That is the case which the Plaintiff has undertaken to prove at the hearing; and then she says: "In order to enable me to shew what the conduct of the parties was, it is important I should shew exactly what they have drawn out of the new business. They drew out large sums of money. Here is a gentleman who, I say, came in with notice of the source from which the assets of the new business were derived; he says that he did not, that he merely came in as a partner entitled to receive his capital and a fixed sum by way of interest upon it. I intend to shew that he is liable to account to me for more than that." Moreover, she says, "I should like to know from him what sums of money he and his two partners have respectively drawn out, whether in respect of capital or profits from this new business." There is nothing vexatious or oppressive in calling for an answer to that, and it may be very material at the hearing to know what sums the Defendants have drawn out of the new business. There is nothing, therefore, to exempt this Defendant from the ordinary rule that he must answer fully. Of course the interrogatory is not to be understood as applying to money which the partners have drawn out for the purpose of paying a creditor or taking goods out of bond, or anything of that kind; it only applies to

(1) *Ante*, p. 73.

sums debited against the partners as being drawn out for themselves, and not for the purposes of the partnership.

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SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Miller & Miller*; Mr. *W. Stopher*.

In re SOUTH.

L. JJ. 1874 *March* 16.

Judgment Creditor—Law of Judgments Amendment Act (27 & 28 *Vict. c.* 112), *ss.* 1, 4—*Remainder—Infant—Petition for Sale—Erroneous Return by Sheriff.*

A Plaintiff, who had recovered judgment with damages in an action in tort against an infant, sued out an elegit against the infant's land on the judgment. The infant's only interest in land was a remainder in fee expectant on the death of a tenant for life, which produced no present income to the infant. The sheriff returned that the infant was seised of the reversion of the land in fee simple, and that it was of the annual value of £124, and that he had delivered the premises to the creditor. The creditor then presented a petition under the 27 & 28 Vict. c. 112, s. 4, for a sale of the infant's interest in the land:—

Held, first, that the sheriff had no power to seize an estate in remainder belonging to an infant, and therefore the judgment creditor had acquired no charge on the infant's interest. Secondly, that the sheriff having erroneously returned that the infant was seised of a reversion producing a present income, a petition for sale of the infant's interest, which was a bare remainder, was inconsistent with the return and could not be supported.

The decision of *Malins*, V.C., reversed.

THIS was an appeal from a decision of Vice-Chancellor *Malins*.

On the 23rd of December, 1872, *Caleb Houghton* recovered damages in an action for seduction against *Thomas Denton South* for £500 (which was afterwards reduced to £300), and £62 costs.

South was born on the 16th of January, 1853, and consequently was an infant at the time when judgment was recovered against him.

Under the will of his grandfather, *A. Boyack*, *South* was entitled to a freehold house and premises in *Kent* in remainder expectant on the death of the testator's widow, who was still alive, but subject

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to the contingency of his dying in her lifetime, in which case the property was given to his sister.

He was also, under the will of his father, *T. South*, entitled to a freehold and copyhold estate in *Middlesex* in remainder expectant on the death of his grandmother and his mother, both of whom were alive.

Houghton, in order to enforce his judgment, sued out writs of elegit directed to the sheriffs of *Middlesex* and *Kent*. The sheriff of *Middlesex* made a return to the effect that he had held an inquisition on the 5th of June, 1873, by which it was found that *T. D. South* "was seised in his demesne of the reversion in fee simple" of the freehold and copyhold estate in *Middlesex*, "being of the annual value of £124;" which said premises he had caused to be delivered to the said *Caleb Houghton* by a reasonable price and extent, until the sum of £366 18*s.* 6*d.*, with interest, should have been levied.

A similar return was made by the sheriff of *Kent*, stating that the annual value of the property extended in *Kent* was £20.

On the 3rd of November, 1873, the judgment and the two writs of elegit having been duly registered, *Houghton* presented a Petition under the 27 & 28 Vict. c. 112, s. 4, praying for a sale of *South's* estate and interest in the property in *Middlesex* and *Kent* under the wills of his father and grandfather, in order to pay what was due in respect of the infant's debt, interest, and costs.

On the 22nd of January, 1874, *South*, having attained the age of twenty-one, paid *Houghton* £382 16*s.* 9*d.* in discharge of the judgment debt, interest, and costs.

On the 20th of February, 1874, the Vice-Chancellor made an order on the Petition that *South* should pay *Houghton* the costs of the Petition, including the costs of the writs of elegit and inquisitions, and the sheriffs' charges (1). From this order *South* appealed.

(1) 1874. Feb. 20. W.N. (1874) 40

SIR R. MALINS, V.C.:—

The proposition laid down on behalf of the Respondent comes to this, that where a man has only a reversionary interest in land, there are no means of getting at it for the payment of his debts.

It is clear that under section 11 of 1 & 2 Vict. c. 110, a judgment entered up became a charge upon the real estate of the debtor. But that state of the law being productive of incon-

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Mr. *E. Cooper Willis*, and Mr. *O. L. Clare*, for the Appellant:—

The sheriffs' returns are false in both cases, for they have stated that the debtor was "seised in his demesne of the reversion in fee simple" of the estates, and that they were of the annual value of £124 and £20 respectively, whereas in reality the interest of the debtor was only a remainder, and, in the case of the *Kent* estate, was subject to be divested if he died before his grandmother, and in neither case was the estate productive of any present income to him. The debtor is not bound by the sheriff's return. The inquisition is made *ex parte* on information furnished by the creditor. A sheriff had no power to seize a bare remainder under the old law: *Viner's* Abr. "Statute Merchant" (1). Then the 1 & 2 Vict. c. 110, s. 11, enacts that the sheriff shall make and deliver execution of such lands and hereditaments "as the person against whom

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venience, it was enacted by the statute of 27 & 28 Vict. c. 112, s. 1, that a judgment should not be a charge upon land until it should have been actually delivered in execution. This, however, was not an Act for abrogating the rights of creditors more than was necessary to provide that a debt should no longer be a charge on land, unless execution was taken out. This is clearly the principle of the Act, because sect. 3 provides for the registration of writs or processes whereby any land has been taken in execution; and by sect. 2 the expression "land" is interpreted to mean "all hereditaments, corporeal or incorporeal, or any interest therein."

Then sect. 4 goes on to provide the remedy of the execution creditor, by enacting that every creditor whose land has been delivered in execution shall be entitled forthwith, by petition in this Court, to obtain an order for sale of the land. The only change in the law is, that now the land must be delivered in execution before there can be any charge. I recently had before me a case of *Hatton* v. *Haywood* (Law Rep. 9 Ch. 229), where a judgment creditor had attempted to levy an execution upon an equitable interest in land, and the sheriff had returned *nil*, and I held that the judgment creditor, having done all he could towards getting delivery of the land at law, was entitled to enforce his judgment by a suit in this Court; but as he had not done so before the debtor became bankrupt, he had no charge on the land; and my decision was affirmed by the Court of Appeal. That was a case where there was no interest in land which the sheriff could take in execution. But here I have the return that the interest of the petitioner has been actually delivered to the judgment creditor.

I am therefore of opinion, that upon the broad principle that every legal interest in land, of whatever kind, is now capable of being taken in execution, the Petitioner was, when the Petition was presented, entitled to what he asked, and he must now have the costs of the Petition, and any costs of the sheriff which have not been paid.

(1) P. 15.

L. JJ. 1874 *In re* South.

the execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment or at any time afterwards, or over which such person shall at the time of entering up such judgment or at any time afterwards have any disposing power which he might, without the assent of any other person, exercise for his own benefit." A man cannot be "seised or possessed" of a remainder. Therefore, under the former part of the clause the sheriff cannot seize a remainder; and the latter part of the clause has no application to the present case, as the debtor was an infant at the time when the return was made.

The 27 & 28 Vict. c. 112, s. 1, is imperative, that no judgment creditor can get a charge upon the land until it has been actually delivered in execution, and the circumstance that the interest is of such a nature that it cannot be delivered in execution by the sheriff makes no difference: *In re Duke of Newcastle* (1); *Hatton* v. *Haywood* (2). This Petition, therefore, is groundless, and ought to be dismissed.

Mr. *Everitt*, for the creditor:—

An infant's real estate may be made chargeable by an order of this Court: *In re Howarth* (3). The debtor is bound by the sheriff's return so long as it is unimpeached. If it is erroneous it may be quashed by a proper proceeding; but until that is done it must be taken to be correct. The passage cited from *Viner's* Abridgment is not conclusive. He is there speaking of a remainder in the hands of an assignee. If a reversion may be seized, there is no reason why a remainder should not be subject to the same process.

Mr. *E. Cooper Willis*, in reply, as to the costs.

Sir W. M. James, L.J.:—

I am of opinion that the order of the Vice-Chancellor in this case cannot be sustained. The principle in this case is governed

(1) Law Rep. 8 Eq. 700. (2) *Ante*, p. 229.
(3) Law Rep. 8 Ch. 415.

L. JJ. 1874 In re SOUTH.

by the decision of the full Court in *Hatton* v. *Haywood* (1). But independently of that the sheriff is only empowered to seize those lands of which the debtor is "seised or possessed," for those are the words of the 11th section of the 1 & 2 Vict. c. 110. A man cannot be "seised or possessed" of a remainder. The sheriffs, or whoever prepared the return of their writs, were fully aware of this, for in the returns it is stated that the debtor is "seised in his demesne of the reversion in fee simple," which describes an interest which was subject to be taken by the sheriff; whereas the debtor was really entitled to a remainder, which could not be taken. The Petitioner asks for a sale of a remainder upon a return which states that the debtor was seized of a reversion. It is much the same as if the debtor were seised of *Blackacre* and the Petition asked for a sale of *Whiteacre*.

The Petition is entirely wrong, and must be dismissed; and inasmuch as it was presented so short a time before the debtor attained the age of twenty-one years, when he at once paid the debt, and the Petitioner might well have waited till that time, it must be dismissed with costs.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Le Riche & Son*; Mr. *E. Woodard*.

HALFHIDE *v.* ROBINSON.

[1870 H. 96.]

L. JJ. 1874 March 16.

Person of Unsound Mind—Partition Suit—Next Friend—Sale of Real Estate—Lunacy Regulation Act, 1862 (25 & 26 *Vict. c.* 86), *s.* 13—*Trustee Act*, 1852, *s.* 1.

It is irregular for a bill to be filed by a person of unsound mind not so found by inquisition, by his next friend, for the purpose of dealing with the real estate of the person of unsound mind.

A bill was filed by a person of unsound mind not so found, by his next friend, for a partition or sale of real estate, and a decree for sale was made. A petition was afterwards presented under the *Trustee Act*, 1852, for an order

(1) *Ante*, p. 229.

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vesting the estate of the Plaintiff in the purchaser. The Court refused to make the order, considering that the suit was irregular, but as the Plaintiff's share was only £200, and she had no other property, the Court directed an application to be made in Lunacy, under the 13th section of the *Lunacy Regulation Act*, 1862, for a sale, and permitted the petition to be amended for that purpose.

Ante 85
18 Eq 270
2 Ch D 679

THE bill in this case was filed for the partition or sale of real estate belonging to three persons as tenants in common.

The Plaintiff was a lady of unsound mind not so found by inquisition, suing by her uncle as next friend. The Defendants asked for a sale instead of a partition, which was accordingly ordered by Vice-Chancellor Sir *J. Stuart*, before whom the cause was heard.

When the matter was in Chambers it appeared that one of the Defendants had gone abroad and had not been heard of for some time, which circumstance would prevent the property from being sold at a public sale for its real worth. The other Defendant thereupon offered to purchase the shares of his two co-tenants for £400; and this offer having been sanctioned by the Court, a petition was presented in the suit, under the *Trustee Act*, 1852, for an order vesting the Plaintiff's share in the property in the purchaser, which was heard at the purchaser's request, in the first instance, before the Lords Justices.

Mr. *Miller*, Q.C., and Mr. *T. Brett*, for the Petitioners, referred to the *Trustee Act*, 1852 (15 & 16 Vict. c. 55, s. 1): *In re Good Intent Benefit Society* (1), *Herring* v. *Clark* (2), and *In re Ormerod* (3).

SIR W. M. JAMES, L.J.:—Is there any authority for filing a bill for a partition of real estate by a person of unsound mind by a next friend?

Mr. *Miller*:—It is merely a matter of form whether the person of unsound mind is a Plaintiff or Defendant. There is no question that she might have been made a Defendant, and as the other tenants in common desired a sale, the same decree would have been made as has now been made. The costs would come out of the proceeds of the sale alike in both cases. The evidence

(1) 2 W. R. 671. (2) Law Rep. 4 Ch. 167.
(3) 3 De G. & J. 249.

shews that the lady has no other property than this small estate, which is quite unproductive under present circumstances, and she is entirely supported by her uncle, who is the next friend.

SIR W. M. JAMES, L.J.:—

I think that this suit is altogether irregular. Such a bill ought not to have been filed by a next friend on behalf of a person of unsound mind not so found by inquisition. It is said that it is a mere matter of form, for that if the parties were transposed, and the person of unsound mind made a Defendant, there must have been a decree for sale just the same as has now been made. But in that case the Plaintiff would have taken the risk of the costs of the suit.

However, we can apply our powers under the *Lunacy Regulation Act* (1) to the case. We shall be exercising our power of selling the lunatic's property on terms which we think beneficial to the lunatic, but not under this suit, nor adopting the proceedings under it in any way. A petition must be presented under the *Lunacy Regulation Act*, or, if the Petitioners prefer it, they may amend this petition by making it under that Act, and they must state what is the total value of the lunatic's property. The matter will be dealt with in Lunacy, and we must be informed of the exact sum which will come to the lunatic under the sale, after providing for the costs which her share will have to bear, and we shall be able to concur with the other parties in carrying out the sale.

I wish it to be understood that a bill cannot be filed by a next friend on behalf of a person of unsound mind not so found by inquisition, for dealing with his real estate. The consequences of such a course might be monstrous.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Duncan & Murton*, agents for Messrs. *Hart & Head, Reigate.*

(1) 25 & 26 Vict. c. 86, ss. 12, 13, by which power is given to the Lord Chancellor intrusted, &c., where the property of a lunatic does not exceed £1000, to apply it for his benefit without an inquisition of lunacy; and for that purpose to order a sale of his real estate or other property.

L. JJ. 1874 March 23, 24.

GREAT WESTERN COLLIERY COMPANY *v.* TUCKER.

[1873 G. 47.]

Answer—Exceptions—Private Transactions.

Where a Plaintiff files a bill founded on the alleged agency of the Defendant, which is in question in the suit, the Defendant will not be compelled to answer interrogatories as to what appear to be his private transactions.

Order of *Malins*, V.C., affirmed.

THE bill in this case was filed by a company called the *Great Western Colliery Company*, against *S. W. Tucker* and *E. H. Thomas*, and alleged that *Tucker* and *Thomas*, in 1863, conceived the design of purchasing from the *Great Western Railway Company* a colliery called the *Gyfeillon Colliery*, forming a company, and securing a large profit by charging that company with a much higher price for the colliery than would be paid to the railway company; that the Defendants, in 1864, accordingly agreed, in the name of one *Ward*, to purchase the *Gyfeillon Colliery* from the railway company for £35,000. The bill then stated certain alleged dealings between the Defendants, one *Rossall* and others and the *Agra and Masterman's Bank*, for raising money to pay for the colliery, and stated the formation, in 1865, by the Defendants of the *Great Western Colliery Company*, with a capital of £150,000, and that the directors of the company soon afterwards agreed to buy the colliery from *Ward* for £50,000; and the bill alleged that the directors did this under the influence of *Tucker*, who was solicitor to the company; and the bill contained statements as to the alleged circumstances of the purchase, and that the company was not aware of them until the year 1871. And the bill prayed a declaration that the Defendants were the agents of, and stood in a fiduciary position towards, the company in respect of the purchase by the company of the *Gyfeillon Colliery*, and ought to refund to the company any profit made by the sale or re-sale of the colliery to the company; and the bill prayed an account of the profits, and that the necessary directions might be given.

The Plaintiffs filed forty-seven interrogatories, the seventeenth of

which was that the Defendants might set forth a full, true, and particular account of all cheques drawn on the account of *Rossall* and others in the books of the *Agra and Masterman's Bank*, including the names, dates, &c.; the eighteenth, that the Defendants might set forth an account of the profits made by them by virtue of the purchase and re-sale of the *Gyfeillon Colliery*, and how such profits were made, and whether by money or by the sale of coals, and how they were dealt with. In five other interrogatories the Plaintiffs asked discovery as to cheques drawn and as to profits.

The Defendants put in answers of great length, denying that *Tucker* had anything to do with the purchase, and denying the agency and many of the allegations in the bill as to the circumstances of the sale. The answer of *Thomas* gave some details as to cheques, but refused to answer further as to other cheques which the answer stated to have been drawn for carrying on the colliery works, these works having been carried on by *Thomas* for several months. *Thomas* denied that he had made any profit by the sale, and said that if there was any profit, it was from the increase of value of the colliery, and from the addition of certain rights which were also sold to the company, and from the sale of coal; and he refused to set out any account of the profit.

The Plaintiffs excepted to the answers, and the Vice-Chancellor *Malins* overruled the exceptions.

The Plaintiffs appealed.

Mr. *Chitty*, Q.C., and Mr. *Plummer*, in support of the appeal:—

Every Defendant who answers must answer fully, and we have a right to this discovery. The case is exactly like *Hichens* v. *Congreve* (1), and is within *Moore* v. *Craven* (2).

Mr. *Glasse*, Q.C., Mr. *Higgins*, Q.C., and Mr. *Crossley*, for *Thomas*, were not called upon.

SIR W. M. JAMES, L.J., said that the case made by the bill seemed to be rather one for setting aside the purchase than for retaining the property at a lower price; but, independently of that question, the case depended on the truth of the allegations that

(1) 4 Russ. 562. (2) Law Rep. 7 Ch. 94, n.

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the Defendants were agents for the Plaintiffs. His Lordship then continued:—

The question, then, is whether the relation of principal and agent existed between the parties. Now this appears to be essentially one of those cases in which the Court will not compel a Defendant to give discovery of his own private means and transactions, on the speculation that the Plaintiff may afterwards want it, if at the hearing he succeeds in the preliminary proposition that the Defendant is or was an agent. It would be monstrous that a man, by merely alleging that he had a share in a concern, which allegation was denied, and had not been established, and whilst it was doubtful whether it would be established, could get the accounts of a Defendant's private business, and of his dealings with other people. We think that the Vice-Chancellor was quite right in overruling the exceptions. This is exactly one of those cases referred to by the Lord Chancellor in *Elmer* v. *Creasy* (1), where the Court may be trusted to exercise a proper control over any attempt on the Plaintiff's part to press for discovery which would be vexatious or unreasonable. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J., concurred.

Solicitors for the Plaintiffs: Messrs. *Speechly & Chamberlain.*
Solicitors for the Defendant: Messrs. *Tucker, New, & Langdale.*

(1) *Ante*, p. 69.

Ex parte BANNER. *In re* KEYWORTH.

L. J. J.
1874
March 20.

Secured Creditor—Action on Bill of Exchange—Payment of Money into Court to abide the event—Bankruptcy of Defendant—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 16 (*sub-s.* 5), 72—*Bills of Exchange Act*, 1855 (18 & 19 *Vict. c.* 67), *s.* 2.

An action upon an overdue bill of exchange for £1200 was brought against the acceptors. The Defendants obtained leave to appear and defend the action upon paying into Court £880 to abide the event. An order was afterwards made referring the matter in dispute to arbitration. Before any award was made the Defendants filed a liquidation petition. The trustee claimed the £880 for distribution among the creditors generally, and obtained an order from the County Court restraining further proceedings in the arbitration:—

Held (affirming the decision of *Bacon*, C.J.), that the Plaintiff in the action was, at the commencement of the liquidation, a secured creditor, and that an inquiry must be directed in the Court of Bankruptcy to ascertain to how much of the £880 he was entitled.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

On the 5th of April, 1873, a bill of exchange for £1200, payable three months after date, was drawn by *John Lacy* upon Messrs. *J. & H. Keyworth & Co.*, shipowners, of *Liverpool*. The bill was accepted by them, and was indorsed by *Lacy* to Messrs. *Tate & Co.* The bill became due on the 8th of July, 1873, and was dishonoured, and on the 11th of July *Tate & Co.* commenced an action on the bill, in the Court of Common Pleas at *Lancaster*, against *Keyworth & Co.* The Defendants applied to the Court, under the provisions of sect. 2 of the *Summary Proceedings on Bills of Exchange Act*, 1855 (18 & 19 Vict. c. 67), for leave to appear and defend the action. An affidavit in support of the application was made by one of the Defendants and *Lacy*, by which it appeared that *Keyworth & Co.* accepted the bill at the request of *Lacy* as a guarantee for the payment of the premiums on some insurances which he was then about to effect with *Tate & Co.*, and that *Keyworth & Co.* received no consideration for accepting the bill. *Lacy* deposed that at the time of making his affidavit he did not owe *Tate & Co.* more than £200. On the 22nd of July

L. J. J. 1874 *Ex parte* BANNER. *In re* KEYWORTH.

an order was made by the Court, that "on payment into Court by the Defendants of the sum of £880 to abide the event, the Defendants be at liberty to appear and defend this action." The same day the £880 was paid into Court. On the 29th of July, on the application of the Defendants, a compulsory order was made that the matters in dispute in the action should be referred to the award of an arbitrator.

On the 2nd of September, 1873, *Keyworth & Co.* filed a liquidation petition. The creditors resolved on a liquidation, and appointed Mr. *Banner* trustee. On the 5th of November the trustee applied to the Court for an injunction to restrain the proceedings in the arbitration and the prosecution of the action, and for an order declaring that the £880 belonged to the trustee. At this time no award had been made by the arbitrator. The Judge of the *Liverpool* County Court, on the 21st of November, granted the injunction asked for, and made an order declaring that the £880 belonged to Mr. *Banner* as trustee under the liquidation, and that the Plaintiffs in the action should consent to the payment out of Court to the trustee of the £880. From this order Messrs. *Tate & Co.* appealed to the Chief Judge in Bankruptcy.

The Chief Judge reversed the order of the County Court Judge, being of opinion that *Tate & Co.* were entitled to be paid out of the sum of £880 the amount of their debt and costs, and directed an inquiry as to that amount (1). From this decision the trustee appealed.

(1) 1874. Jan. 26. WN(1874)22

SIR JAMES BACON, C.J.:—

This case, no doubt, is one of considerable importance and of some nicety, but it must be decided upon the general law; and I do not think that the clauses in the present *Bankruptcy Act*, or in any other Act, which have been referred to, of themselves conclusively determine the question whether the Appellants were, at the filing of the petition, secured creditors holding or having security on the estate of the debtors. There can be no doubt, in my mind, that the object of the law relating to bills of exchange is that, if a man who is sued comes and says, "I have a defence to this action, and I swear I have a defence," the Judge is to look into so much of the circumstances of the case suggested, not proved, before him as will satisfy him of the amount of security (that is the proper word to use) that shall be given by the Defendant to abide the event of the action; and, without professing to know in what form these orders are usually drawn up in the Courts of Common Law, I do not hesitate to say that the order made in this case is a proper order, and is in accordance with

Mr. *Benjamin*, Q.C., and Mr. *Bigham*, for the Appellant, contended that the *Bills of Exchange Act*, as was clear from the preamble, was not intended to give the Plaintiffs any such "mort-

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the Act of Parliament, the object of which was to provide a security (emphatically) to abide the result of the pending action. If it were necessary to give reasons for this conclusion, they could be readily furnished. If it were otherwise, a bankrupt intending to cheat the creditor who was suing him would be furnished with a ready means of doing so, because he could easily find the money necessary to be deposited, intending to become bankrupt the next day or at some other time; and, if there were half a dozen creditors suing him on bills of exchange, he might find the money for the purpose of temporary deposit, with a certain conviction that it could be got back again when he was bankrupt. That is one of the evils which would arise from such a mode of dealing with the subject. But I think the transaction is plain and distinct, and, according to all the cases cited, the £880 paid into Court ceased, upon its being paid into Court, to be the property of the debtors; it was no longer part of their estate. If the action had gone on to judgment, and the judgment had been for the Plaintiff for £880, the matter would have been quite clear and plain; the money would have belonged to the Plaintiff. In the cases referred to, the right of the Plaintiff—the person who had procured the deposit to be made—is, as it seems to me, recognised beyond the possibility of dispute. In one of them—*Furnival* v. *Bogle* (4 Russ. 142)—it is true, the order was not made for immediate payment out, and the appeal was dismissed; but this was because some further proceeding in the Mayor's Court was necessary to ascertain how much of the sum deposited belonged to the man for whose security and for the satisfaction of whose claim it had been deposited. The case of *Holmes* v. *Tatton* (5 E. & B. 659), Lord *Campbell's* judgment in which was commented upon so elaborately by Mr. *Benjamin*, has not, in my opinion, the smallest application to the present case. That was a question whether, upon the strict construction of that clause of the *Common Law Procedure Act* of 1854 by which service or notice of an order of attachment binds, in the hands of the garnishee, debts due or accruing due to the judgment debtor—whether notice of such an order was so binding on the garnishee that from that time the judgment creditor had a right to say that the money attached belonged to him, or that he had a lien upon it. It was decided that he had no lien, that there was no contract to give him a lien, and that there was nothing in the Act of Parliament properly construed that gave him anything amounting to a lien. That is all that that case decides. In the present case I find the state of things to be this: when the liquidation commenced there was a sum of £880, which formed no part of the debtors' estate, which had been paid into Court to abide the result of an action. If that action went on to judgment, the Plaintiff was entitled to be paid his debt, if established, and the amount of his costs, out of the sum deposited. That right, I think, the Plaintiff has still, because I am wholly prevented from adopting that part of Mr. *Benjamin's* argument in which he said the deposit was to abide the result of the action, or to wait until the action was determined. That is an event which never can happen now, because

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gage, charge, or lien" on the Defendants' property as would make him a secured creditor under the terms of the 16th section of the *Bankruptcy Act*, 1869: *Ex parte Greenway* (1) (2).

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the Judge of the County Court has, by his injunction, made it impossible to proceed in the action. There is great plausibility in that mode of putting the case, and at one time, having to carry into execution the Act of 1869, regarding its provisions, noticing the fact that the 184th section of the Act of 1849 is omitted from it, and that there is contained in it the power given by sect. 13 to grant injunctions, I did think that, consistently with the spirit and with the letter of the existing bankruptcy statute, that might be read as a substitute for the 184th section of the Act of 1849; and so I decided. But my decision in *Ex parte Rocke* (Law Rep. 6 Ch. 79) was held by the Court of Appeal to be wrong, and it was reversed. The view which I had taken of the statute in that respect was held to be incorrect, and Lord *Hatherley*, in deciding that case, after referring to what I had decided, and my reasons for so deciding, said: "It is evident, from the wording of the 13th section and of the corresponding rule, that it is left to the discretion of the Judge whether, in any particular case, he will or will not grant an injunction. But it could not have been the intention of the Legislature to make the rights of the creditors *inter se* depend upon the discretion of a Judge in Bankruptcy in granting or withholding an injunction." A more clear covering than that of the point which Mr. *Benjamin* argued it is impossible to conceive. It is in vain to say I regret it, because I think the omission (whether accidental or not I am not at liberty to say) of the 184th section has been injurious to the administration of bankruptcy. Such is the law by which we are all bound, and which I am bound to administer. I think the Appellants in this case are entitled to have that question, which was pending between them and the debtors when the £880 was deposited, decided. I think, having regard to the 72nd section of the Act, and without any objection or opposition, as I understand, on the part of the Appellants, proceedings may now be taken in bankruptcy to ascertain what is the amount that should be paid to them out of the sum deposited. I think, therefore, that the £880, which, as I have already said, at the time when the petition was filed, formed no part of the debtors' estate, ought not to be paid over to the trustee to be distributed among the creditors proving under the liquidation. I think it would be convenient, right, and just that it should be transferred into the liquidation; and there must be some proceedings to determine to how much the Appellants are entitled. The amount may, if the parties so agree, be determined in the arbitration; otherwise there must be an inquiry for this purpose before the learned Judge. I make no order as to the costs of the appeal.

(1) Law Rep. 16 Eq. 619.

(2) The following cases were also cited on the hearing before the Chief Judge: *Taylor* v. *Marling* (2 Man. & G. 55); *Wynne* v. *Jackson* (2 Russ. 351); *Furnival* v. *Bogle* (4 Russ. 142); *Murray* v. *Arnold* (3 B. & S. 287); *Holmes* v. *Tutton* (5 E. & B. 65); *Culverhouse* v. *Wickens* (Law Rep. 3 C. P. 295); *Ferrall* v. *Alexander* (1 Dowl. 132); *Turner* v. *Jones* (26 L. J. (Ex.) 262); *Tilbury* v. *Brown* (30 L. J. (Q.B.) 46); *Wood* v. *Dunn* (Law Rep. 2 Q. B. 73); *Febart* v. *Stevens* (30 L. J. (Ex.) 1).

L. J. J.
1874
Ex parte BANNER.
In re KEYWORTH.

SIR W. M. JAMES, L.J.:—I cannot see what jurisdiction the County Court Judge had to make an order that the Plaintiffs in the action "should consent to the payment out of Court" of any sum.

Mr. *North*, for the creditors, was not called on.

SIR W. M. JAMES, L.J.:—

The sum in question was paid into Court to abide the event of the action. It is similar to what is constantly done in this Court when a bill is filed to restrain an action at law and the Plaintiff is ordered to pay into Court the amount claimed in the action. It belongs to the party who is found eventually to be entitled to the sum in dispute. I am of opinion that the Chief Judge was right. The appeal must be dismissed with costs.

Solicitor for the Appellant: Mr. *J. H. Lydall*, agent for Messrs. *T. & T. Martin, Liverpool.*

Solicitor for the Creditors: Mr. *W. W. Wynne*, agent for Messrs. *Simpson & North, Liverpool.*

Ex parte KEMP. *In re* FASTNEDGE.

L. J. M.
1874
March 6, 20.

Bankruptcy—Order and Disposition—Bankers' "Marginal Notes"—Debts due in the Course of Trade—Bankruptcy Act, 1869, *s.* 15, *sub-s.* 5.

Sums retained by bankers against acceptances, and for which they have given marginal notes, are not debts due to the bankrupt in the course of his business within the order and disposition clause, *Bankruptcy Act*, 1869, s. 15, sub-s. 5.

The expression "debts due" in that clause is not to be confined to debts presently payable, but, on the other hand, will not include debts which were only contingent at the commencement of the bankruptcy.

THIS was an appeal by the trustees in the liquidation of Messrs. *Fastnedge & Co.* from an order of Mr. Registrar *Spring Rice* sitting as Chief Judge. Messrs. *Fastnedge & Co.* were exporters of goods to *India*, and were in the habit of selling the bills drawn by them

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against the consignments upon the consignees in *India* to bankers in *London*, with the bills of lading attached as security. The bankers were not accustomed to advance the whole of the price of the bills in cash. They paid 70 per cent. or upwards in cash, and for the rest of the price gave Messrs. *Fastnedge* what are called in the trade "marginal notes." The effect of these notes was that the bankers giving them contracted to hold the residue of the price of the bills of exchange on deposit, bearing interest, by way of security for the payment of the bills, and that the amount so deposited was not to be paid to Messrs. *Fastnedge* until advice was received of the due payment of the bills, and was then to be subject to any other claims which the bankers might have against Messrs. *Fastnedge*.

The marginal notes given by the different bankers were not exactly identical in form, but were substantially to the same effect. Those given by the *Chartered Bank of India, Australia, and China*, were in the following form:—

"*Chartered Bank of India, Australia, and China,*
"*London*, 21 Feb., 1873.

"Bills, Nos. 426, 427 for Rs.839 13. 0. purchased at 1/11⅝	£79	3	5
"Paid this day	59	3	5
"Leaving a margin of twenty pounds .	£20	0	0

to be accounted for to Messrs. *Fastnedge & Co.* on receipt of advice of the due payment of the above bills, and after providing for any deficiency on other liabilities of the said parties to the bank. Interest to be allowed at *Bank of England* minimum rates, but not to exceed 5 per cent. per annum.

"*J. H. Smythe*, Manager."

These notes were not meant to be transferable, and in some cases the words "not transferable" were written across the face of the document.

Messrs. *Barbour & Brother* were commission agents in *Manchester*, and had dealings with Messrs. *Fastnedge*. Since the year 1870 they had been in the habit of selling goods to Messrs. *Fastnedge*, drawing bills upon them for the price of the goods, and receiving from them marginal notes which had been given

them by *London* bankers, as a security for the payment of such bills. The marginal notes in question in the present case were all given by different bankers to Messrs. *Fastnedge & Co.* previous to the month of March, 1873, and were indorsed by Messrs. *Fastnedge* to *Robert Barbour & Brother*, and deposited with them as a security for the price of goods sold by *Robert Barbour & Brother* to Messrs. *Fastnedge*.

On the 26th of March, 1873, Messrs. *Fastnedge* presented a petition for liquidation by arrangement. At that time no notice had been given to the various bankers that the marginal notes had been assigned to *Robert Barbour & Brother*. Messrs. *Fastnedge* inserted the name of *Robert Barbour & Brother* in the list of their creditors for £3500. At the time the petition for liquidation was presented none of the bills of exchange in respect of the price of which the marginal notes were issued had been accepted, but since that time they had all been accepted and paid, and the bankers were willing to pay the sums of money represented by the marginal notes to whoever was legally entitled to receive such sums.

Under these circumstances the trustee claimed the sums represented by the marginal notes as having been within the order and disposition of Messrs. *Fastnedge* at the commencement of the liquidation, but the Registrar rejected the claim, being of opinion that they were not debts within the meaning of the 5th sub-section of the 15th section of the *Bankruptcy Act*, 1869 (1). From this decision the trustee appealed.

Mr. *Benjamin*, Q.C., and Mr. *Linklater*, for the Appellant:—

The question turns upon the construction of the words "debts due to him" in the 5th sub-section of the 15th section of the *Bankruptcy Act*, 1869. We contend that these marginal notes

(1) 32 & 33 Vict. c. 71, s. 15 (subsect. 5), enumerates among descriptions of property divisible among the creditors of a bankrupt: "All goods and chattels being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt, being a trader, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner: provided that things in action, other than debts due to him in the course of his trade or business, shall not be deemed goods and chattels within the meaning of this clause."

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were debts, as the word is used in that Act and in similar Acts. The sum represented by the marginal note was part of the price of the bill of exchange, which was kept back for his own security by the banker, but was due to the person selling the bill. It was *debitum in præsenti solvendum in futuro*. It was not merely payable on a contingency, for it was certainly to be paid in one way or another; if the bill of exchange was duly met, it would be paid in cash; if the bill was dishonoured the marginal note would be allowed in account in discharge of the liability on the bill. If we look at the use of the word "due" in the Act, we shall find that it has a wide meaning, like "payable." In sect. 19 the words "debts due to and from him," of which the bankrupt is to give an inventory, certainly include debts which are not then payable. So in sect. 49 "debts due to the Crown" must include those not yet payable.

[They also referred to *Ryall* v. *Rolle* (1); *Ex parte Greenway* (2).]

Mr. *Little*, Q.C., and Mr. *Marten*, Q.C., for Messrs. *Barbour & Brother*:—

We claim the money represented by the marginal notes under the equitable assignment to us by the liquidating debtor at the date of the presentation of the petition for liquidation, at which date the rights of the parties must be determined. At that time the bills of exchange had not been accepted, and the goods were on the sea. It was therefore entirely contingent whether the marginal notes would ever constitute a debt or not: *Jeffryes* v. *Agra and Masterman's Bank* (3). The word "due" means "payable." That was expressly decided as to sect. 6 by *Ex parte Sturt* (4), and the word is used in the same sense in other sections, particularly in sect. 25, sub-sect. 6 (where debts "due" are contrasted with debts "growing due"), and sects. 32, 34, and 35. Only such debts were intended to be included as were actually payable, like the ordinary book debts of a trader. The provisions respecting order and disposition are in the nature of a penal enactment, and must be construed literally. Such *choses in action* as marginal

(1) 1 Atk. 165.
(2) Law Rep. 16 Eq. 619.
(3) Law Rep. 2 Eq. 674.
(4) Ibid. 13 Eq. 309.

notes are not within the mischief intended to be remedied: *Ridout* v. *Lloyd* (1); *Lacon* v. *Liffen* (2); *Morris* v. *Cannan* (3); *Ex parte Masterman* (4); *Ex parte Littledale* (5); *Ex parte Watkins* (6).

Mr. *Benjamin*, in reply.

March 20. SIR G. MELLISH, L.J., after stating the facts of the case, continued:—

The question now to be determined is whether the sums represented by these marginal notes ought to be paid by the banks to Messrs. *Barbour & Brother*, or ought to be paid to the trustee, upon the ground that at the time when the petition for liquidation was presented they were in the order and disposition of Messrs. *Fastnedge*, with the consent of Messrs. *Barbour & Brother*, the true owners. The Registrar was of opinion that these sums were, at the time the petition for liquidation was presented, things in action, but were not debts due to Messrs. *Fastnedge* in the course of their trade, and were therefore not to be deemed goods and chattels within the 5th sub-section of the 15th section of the *Bankruptcy Act*, 1869. I have therefore to determine, and, I believe, for the first time, what is the construction to be put on the words "debts due to him in the course of his trade or business" as used in that section.

Now, the words "debts due to him" are certainly words which are capable of a wide or a narrow construction. I think that *primâ facie*, and if there be nothing in the context to give them a different construction, they would include all sums certain which any person is legally liable to pay, whether such sums had become actually payable or not. On the other hand, there can be no doubt that the word "due" is constantly used in the sense of "payable," and if it is used in that sense, then no debts which had not actually become payable when the act of bankruptcy was committed would be included. Lastly, the expression "debts due" is sometimes used in bankruptcy proceedings to include all demands

(1) Mont. 103.
(2) 4 Giff. 75.
(3) 4 D. F. & J. 581.
(4) 2 Mont. & A. 209.
(5) 6 D. M. & G. 714.
(6) Law Rep. 8 Ch. 520.

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which can be proved against a bankrupt's estate, although some of them may not be strictly debts at all.

Illustrations of these various meanings may be found in the Act itself. In the 6th sub-section of the 6th section it is enacted that it shall be an act of bankruptcy if a debtor who has been served with a debtor's summons requiring him to pay a sum due of not less than £50 has neglected to pay that sum. It is obvious that in this place "due" must mean "payable," because it would be absurd to suppose that a man could be made a bankrupt for not paying a debt which was not yet payable. In *Ex parte Sturt* (1) the Chief Judge held that the word "due" must also mean "payable" in the other parts of that section, because it was not to be supposed that the same word could be used in different senses in the same section. So also in the 6th sub-section of the 25th section it is enacted that the trustee may sell the book debts "due or growing due." In that place also due seems to mean payable, because debts due are distinguished from debts growing due. On the other hand, in the 19th section it is enacted that the bankrupt shall give such list of his creditors and debtors, and of the debts due to or from them respectively, as the trustee may reasonably require. In that case it is clear that the word "due" does not mean payable, and that all debts which have been contracted, whether the time for payment has arrived or not, were intended to be included. It is impossible that acceptances payable *in futuro*, or bills of exchange receivable *in futuro*, were intended to be excluded from the list of debts due to or by a bankrupt. Then, again, in the 49th section it is enacted that an order of discharge shall release the bankrupt from all other debts proveable under the bankruptcy except debts due to the Crown. In that place I think that "debts due to the Crown" means all proveable demands which the Crown has against the bankrupt, whether they have become payable or not, and whether they are in point of law strictly debts or not.

It is unnecessary to pursue this investigation further, and I return to the consideration of what is the true construction to be placed on the words "debts due to him in the course of his trade or business," in the 5th sub-section of the 15th section. It was

(1) Law Rep. 13 Eq. 309.

argued for the Respondents that the order and disposition clause was a penal enactment that takes a man's property away from him, and ought, therefore, to be construed strictly. I cannot give any great weight to this argument. In former times this clause was construed most favourably for creditors, of which there cannot be a greater instance than that the words "goods and chattels" were construed to include *choses in action*. In later times the Judges have given a stricter construction to the clause, and have endeavoured as far as possible to confine it to cases properly within its principle. The Legislature has now, in the Act of 1869, re-enacted the clause with certain modifications, and in determining what those modifications are, I must endeavour to discover on what principle the Legislature has acted, and carry that principle out. Things in action other than trade debts, are taken out of the clause, probably because it was thought that things in action other than trade debts were not likely to procure a trader credit from his apparent possession of them when he had really parted with them. His general creditors, in all probability, might never know that he possessed them. Debts due to a trader in the course of his trade or business are excepted, and are still kept within the clause, because what are ordinarily termed a trader's book debts are very likely to procure a trader credit from his apparent possession of them. They often form a most important part of a trader's assets, and they are a part of his property which a trader in good credit does not usually pledge or part with. There can be no clearer mark of a trader being in difficulties than that he is obliged to assign his book debts as a security to a creditor. The Legislature has therefore thought it right not to alter the law which made an assignment of his book debts by a trader void as against his trustee if notice of the assignment had not been given to the debtors prior to an act of bankruptcy being committed. Now this being, in my opinion, the principle on which the Legislature has proceeded, is there any sound reason for making a distinction between those debts which at the time when an act of bankruptcy is committed have become actually payable and those which have not? I cannot see that there is. Many traders are obliged to give long terms of credit to their debtors, and this being known to their creditors, procures them credit also; and if I were to hold that

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debts which have been earned, and which are, in what I consider the proper sense of the word, due to the bankrupt, although they have not yet become payable, were taken out of the order and disposition clause, I cannot help thinking that I should defeat the object which the Legislature had in view in enacting that debts due to a bankrupt in the course of his trade or business should still be kept within the clause.

On the other hand, I think that I have no right to extend the meaning of the words "debts due" so as to include demands which are not properly debts. Until a sum certain has become due, and is to be paid in all events, there is, in my opinion, no debt due. The clause does not relate to demands which may be proved against the estate of a bankrupt, but to debts due to him; and the change in expression from "things in action" to "debts" seems to prove that all things in action which might accrue to a trader in the course of his trade or business were not intended to be included in the clause, but only those which had become debts before an act of bankruptcy was committed.

This, then, being the construction which I put on the clause, I have next to consider whether the sums represented by the marginal notes had become debts due from the respective banks to Messrs. *Fastnedge & Co.* before their petition for liquidation was presented. Now it is obvious that at that time not only had these sums not become payable—which, in my opinion, would not prevent their being debts—but it was wholly uncertain whether any sum would ever become payable to Messrs. *Fastnedge* at all in respect of them. It was argued by Mr. *Benjamin* that, nevertheless, they were debts due to Messrs. *Fastnedge*, because the sums represented by the marginal notes were, as he said, to be paid to Messrs. *Fastnedge* in all events, either by being paid to them in cash, or by being applied to discharge liabilities owing to them. I do not think this argument is sound. In *Jeffryes* v. *Agra and Masterman's Bank* (1), Vice-Chancellor *Wood* thus describes the legal effect of marginal notes:—"These documents, in truth, represent a debt due from the bank, with an engagement to pay that debt to the person to whom they give the receipt note upon a certain condition, and at a certain time, as far as that time is defined by the

(1) Law Rep. 2 Eq. 679.

condition, namely, whenever they receive intelligence that the bills, in respect of the discount of which they reserved this right of retainer, have been duly paid and satisfied. It is, in other words, a debt which will accrue from the bank on that event happening." Lord *Hatherley* had not the point I am considering before him at all, and although the words he first uses, that the documents represent a debt due to the bank, are favourable to the argument of the Appellant, I think his last description is more accurate, that the debt will accrue from the bank on the event happening. If, notwithstanding the bills were dishonoured, an action was brought against the bank to recover the sums represented by the marginal notes, the proper plea to raise the defence of the bank would be a plea of never indebted, and not a plea of payment or of set-off. What I have to consider is, what was it which Messrs. *Fastnedge* assigned to *Robert Barbour & Brother*, and of which *Robert Barbour & Brother* were the true owners at the time the petition for liquidation was presented? Now, it is obvious that Messrs. *Fastnedge* did not assign to *Robert Barbour & Brother*, and *Robert Barbour & Brother* did not become the true owners of sums certain to be paid by the banks to Messrs. *Fastnedge* in all events, but Messrs. *Fastnedge* only assigned to *Robert Barbour & Brother*, and *Robert Barbour & Brother* only became the owners of, contingent claims which might or might not end in becoming debts. In my opinion contingent claims of this kind are not debts due within the 5th sub-section of the 15th section. On the whole, I am of opinion that the order of the Registrar must be affirmed, and the appeal dismissed with costs.

Solicitor for the Appellant: Mr. *H. Wickens.*

Solicitors for the Respondents: Messrs. *Milne, Riddle, & Mellor*, agents for Messrs. *Hinde, Milne, & Sudlow, Manchester.*

L. JJ. 1874 March 11.

In re UNITED PORTS AND GENERAL INSURANCE COMPANY.

BECK'S CASE.

Contributory—Application for Shares—Acceptance—Confirmation—Amalgamation.

6 Ch. D. 683

An arrangement was made for an amalgamation between two companies. A holder of half paid-up shares in the selling company applied, according to the terms of the arrangement, for half paid-up shares in the buying company, and received an answer that shares had been allotted to him, credited with the proportionate part of the net assets of the selling company. His name was placed on the register of shareholders. He afterwards applied for the certificates of his shares, but never received them. The buying company was afterwards wound up, and the amalgamation was decided to be void:—

Held, that as the answer to his letter of application contained fresh terms, those two letters did not constitute a contract to take shares; and that his application for the certificates did not amount to an acceptance of the fresh terms.

Order of *Bacon*, V.C., refusing to put the name of the shareholder on the list of contributories, affirmed.

MR. *BECK* held forty £5 shares (£2 10*s.* paid) in the *Progress Insurance Company*. In 1869 an arrangement was made for the sale of the business of the *Progress Company* to an unlimited company called the *United Ports and General Insurance Company*, and agreements to that effect were executed, one of the terms being that holders of partly paid *Progess* shares should have *United Ports* shares credited with an equal amount. The shares in the *United Ports Company* were £1 each. A circular stating the arrangement, and the terms on which shareholders in the *Progress Company* could obtain shares in the *United Ports Company*, was sent to Mr. *Beck*, and he filled up and sent the printed form of application annexed, as follows:—

"In accordance with the terms of the agreement entered into between the above companies and confirmed by an extraordinary general meeting of the shareholders of the *Progress Assurance Company, Limited*, held on the 24th day of June, 1869, I hereby request that you will allot me 200 shares in the *United Ports and General Insurance Company*, credited with £100 thereon, in

See Nelson's Case

exchange for forty shares held by me in the *Progress Assurance Company, Limited*, upon which the sum of £100 has been paid, the scrip certificate for which is herewith enclosed."

The letter of allotment sent in reply to this application, and dated the 5th of August, 1869, was as follows:—

"Sir,—The directors of the *United Ports and General Insurance Company* have allotted you 200 shares in pursuance of an arrangement with the liquidators of the *Progress Assurance Company* and the *United Ports and General Insurance Company* for a transfer of the former to the latter company, and have entered your name in the register of members of the *United Ports and General Insurance Company* as a member of the company in respect of such shares. The amount to be credited on such shares will be the proportionate amount of the net assets of the *Progress Assurance Company, Limited.* Certificates for such shares will be issued in exchange for this allotment letter when requested in writing so to do.

"*J. E. Leyland*, General Manager."

Mr. *Beck* was entered on the register as the holder of 200 unpaid shares as on the 3rd of August, 1869; the circumstances being the same as those in *Wynne's Case* (1).

On the 10th of August, 1869, Mr. *Beck* wrote to *Leyland*:—

"I request you to forward me certificates for the 200 shares of the *United Ports, &c., Company* which have been allotted to me as an equivalent for the forty shares I held in the *Progress Insurance Company.*"

On the 27th of October Mr. *Beck* again wrote applying for the certificates, and not having received any answer to either of his letters, he wrote on the 8th of November to the chairman of the *United Ports Company* as follows:—

"Two hundred shares of the *United Ports and General Insurance Company* were allotted to me in August last in the place of the forty shares held by me in the *Progress Insurance Company.* I have not as yet received the scrip of these shares, and though I have written twice for it, I have not received any reply to my

(1) Law Rep. 8 Ch. 1002.

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BECK'S CASE.

application. Would you therefore have the matter attended to, or be so kind as to inform me to whom I ought to apply?"

An order for winding up the *United Ports Company* was made on the 6th of November, 1869, but Mr. *Beck* was not aware of it when he wrote his last letter.

The official liquidator applied to have Mr. *Beck's* name placed on the list of contributories of the *United Ports Company* in respect to these 200 shares, but the Vice-Chancellor *Bacon* refused the application (a). It had been decided in *Wynne's Case* (1) that the amalgamation between the companies was void.

The official liquidator appealed.

Mr. *Eddis*, Q.C., and Mr. *Brooksbank*, for the Appellant:—

There was a distinct contract between Mr. *Beck* and the company, and the form of the answer is clear as to the terms. The receipt of the certificates is immaterial; they are merely the shareholder's title deeds, though no doubt they usually mention the sum credited to the shareholder. He does not repudiate on not getting the certificate, or make any inquiry. He knew that he was on the register, and held out to the world as a shareholder. In *Kincaid's Case* (2) the silence was not longer. In *Wynne's Case* the shareholder repudiated as soon as he could, and did not wait till after the winding-up.

Mr. *Jackson*, Q.C., and Mr. *Graham Hastings*, for Mr. *Beck*, were not called upon.

SIR W. M. JAMES, L.J.:—

This appeal really ought not to have been brought. The Vice-Chancellor's view is clearly right. Mr. *Beck* was put on the register of shareholders without any authority from him. That was a perfectly void act, as utterly unauthorized by him, and yet he is now sought to be charged with the consequences.

The sole question is, whether he has in some way, and by something done afterwards, ratified that which was done without his authority, so that the ratification is to be held as equivalent to an

(1) Law Rep. 8 Ch. 1002. (2) Law Rep. 2 Ch. 412, 420.

(a) See W.N. (1874) 48: 22 W.R. 348

original authority. Knowing there was an amalgamation, and being told that there were shares allotted to him, and that they were credited with something, he wrote for his certificates, which were never sent to him. But it is said that, by receiving a letter which told him that he would have something different from that for which he applied, he accepted that something different. It would be monstrous to draw from his application for shares the conclusion that he was to be left on the register liable for the whole amount without being credited with anything whatever. The letter was based on the notion that the amalgamation was going on, and that he was on the list of shareholders credited with the amount he stipulated for. He wanted shares on which he was to be credited with the value of the shares he was giving up in the other company. That never was done. The company were never in a position to do it. The letter amounts to nothing which can make valid a thing which was void. It is perfectly insufficient for that purpose, and the appeal must be refused with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

I think that the Vice-Chancellor's judgment is perfectly right; and it is not necessary to consider whether this case does not come within that class of cases in which, where a person has sent in an application for shares in the case of an amalgamation, through his own company, the allotment is to be assumed to be conditional on the amalgamation having been valid. It is not necessary to decide that point; but I must not be taken to assent to the proposition that even on that ground Mr. *Beck* would not be entitled to be removed from the list of contributories.

Mr. *Beck* by letter applied for shares on the terms on which the amalgamation had taken place, according to which he was to be entitled to be credited with 10*s.* per share. The *United Ports Company* sent an answer saying that they had allotted him shares, but saying that they had credited him with a proportionate amount of the assets of the *Progress Company* instead of 10*s.* per share paid; in fact, his share of the assets might be nothing at all. Those two letters together, notwithstanding he was put on the register, plainly constituted no contract.

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The entire question in the case is, then, whether he did, by writing for his certificates, acquiesce in the alteration so as to accept the shares on different terms from those on which he applied for them, and from those on which he understood that the amalgamation was to take place? It is impossible to infer from his letters that he had any such intention. The reasonable inference from his letters is that he was puzzled, more or less, by the answer not agreeing with his proposal; and, in order to see what was the real truth, he wrote to the company for his certificates. He was entitled to infer that the company knew what sum he had been credited with, and that he was credited with that sum. He asked for the certificates; and it is plain to my mind that, if they had sent him the certificates, and he had found he was not credited with 10*s.* per share, he would have been entitled to send the certificates back and say that they were not in accordance with the agreement for amalgamation or with the proposal he had made.

As a matter of fact, they never credited him with 10*s.*, and the real truth is that the parties never came to an agreement as to the terms on which the allotment of shares was to take place.

The consequence is that there is no agreement to become a shareholder. In such a case the creditors are in no better position than that in which the directors would have been if there had been no winding-up, and they had brought an action against this gentleman for calls. The appeal must be dismissed with costs.

Solicitors: Mr. *A. Pulbrook;* Mr. *S. A. Beck.*

ATTORNEY-GENERAL *v.* RAY.

L. JJ.
1874
March 23.

[1873 A. 6.]

Grant of Life Annuities—Commissioners for Reduction of National Debt—10 Geo. 4, c. 24—Misrepresentation as to Age—Contract void ab initio—Power of Commissioners to rectify Contract.

In 1843 a grant of an annuity was made by the Commissioners for the Reduction of the National Debt, under the 10 Geo. 4, c. 24, to a life assurance company on the life of *C.*, who was certified by the company to be of the age of sixty-four years. After the death of *C.* in 1869, it was discovered that a misrepresentation of his age had been made by the company:—

Held (affirming the decision of *Hall*, V.C.), that the Commissioners were entitled to have the contract declared void *ab initio*, although the misrepresentation was not intentional; and the money paid on both sides was ordered to be repaid with simple interest at 4 per cent.

The statute 10 Geo. 4, c. 24, contained a clause empowering the Commissioners to rectify any contract in case of the discovery of an accidental error:—

Held, that this clause was not compulsory, and that the Court had no jurisdiction to interfere with the discretion of the Commissioners if they declined to exercise their power of rectification, and claimed to have the contract set aside.

THIS was an appeal from a decision of Vice-Chancellor *Hall*.

The information and bill was filed by the Attorney-General and the Commissioners for the Reduction of the National Debt against *Richard Ray*, the public officer of the *Atlas Assurance Company*, to set aside certain contracts by which life annuities were granted to the trustees of the company on the life of *Thomas Chalk*, on the ground of misrepresentation made at the time when the grants were made.

By the statute 10 Geo. 4, c. 24, the Commissioners for the Reduction of the National Debt were empowered to grant life annuities and annuities for terms of years, and the annuities so granted were charged upon the consolidated fund.

By the 40th section it was enacted that if any certificate, or affidavit, or affirmation should be forwarded to the Commissioners which should contain an untrue statement of the age of any person proposed or appointed to be a nominee, with intent to obtain an

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annuity on the continuance of the life of any person under the age of fifteen years, or to obtain any higher rate or amount of annuity during the life of any nominee or nominees than would or might be allowed under the provisions of the Act, according to the true age of such nominee or nominees, then the annuity and the consideration money should be forfeited, and a fine paid to the Crown.

By the 45th section it was enacted that all certificates or other instruments required for carrying the Act into execution should be in such form and under such regulations as the Commissioners should direct and approve; provided that in all cases relating to the purchase of any annuity for lives it should be lawful for them, where any evidence should be produced by any person for the purchase of any such annuity not strictly conformable to the provisions of the Act, to admit such evidence as might appear to them to be satisfactory; and also to correct, rectify, and amend any contract for any such annuity or certificate or other instrument, in cases wherein any mistake or accidental error might have been made in the execution of the act.

Sect. 51 enacted that if any action or suit should be brought against any person for anything done in pursuance of the Act, it should be commenced within three calendar months next after the fact committed, and not afterwards, and the Defendant in every such action or suit might plead the general issue and give the Act in evidence at any trial; and if the jury should find for the Defendant in any such action or suit, or if the Plaintiff should be nonsuited or discontinue his action or suit after the Defendant should have appeared, or if upon demurrer judgment should be given against the Plaintiff, the Defendant should have treble costs.

The *Atlas Assurance Company*, on the 28th of December, 1843, through their actuary, *Charles Ansell*, applied to the Commissioners for the purchase, in the names of the trustees of the company, of an annuity on the life of *Thomas Chalk*, of *Kingston, Surrey*, gentleman; and *Charles Ansell* signed and delivered to the Commissioners a written declaration, whereby he declared that he was desirous, on behalf of the trustees named, to pay to the Commissioners the sum of £936 in money or £3 per Cent. Reduced at 97, and £1 2*s.* 6*d.* commission thereon, for the purchase of a life

annuity; and he thereby nominated *Thomas Chalk*, of *Kingston*, *Surrey*, then of the age of sixty-four, to be the person on the continuance of whose life the annuity was to depend, and whose age was certified and verified by the declarations then produced.

With the declaration of *Charles Ansell* there was produced and delivered to the Commissioners a statutory declaration made by *J. O. Hanson* (one of the trustees of the company), who declared that *Thomas Chalk*, residing at *Kingston*, *Surrey*, was of the age of sixty-four, and was born at *Barking*, *Essex*, and that the names of his parents, or reputed parents, were *William* and *Elizabeth Chalk*, and that *Thomas Chalk* was the same person who was appointed to be the nominee on whose life an annuity was proposed to be purchased; and he stated that the reason why he could not produce a copy of the parochial register of his birth or baptism was that his parents having been members of the Society of Friends he was unable to procure any other record of his birth or baptism than the one annexed, which he had extracted from the Register of Births at the Quarterly Meeting of *London* and *Middlesex* deposited at the General Register Office, *Rolls Buildings*, and which extract he verily believed to be true.

That document was in these terms: "No. 84. On the 19th day of the 11th month, called November, 1779, was born, at *Barking*, *Essex*, unto *William Chalk* and *Elizabeth* his wife, a son, who was named *Thomas*." Three women, who were present at the birth, had subscribed their names as witnesses thereof, and it was signed by *Thomas Gould*, Registrar to the *London* and *Middlesex* Quarterly Meeting. The document or extract was certified at the General Register Office to be a true copy of an entry in the records deposited in that office, under the Act 3 & 4 Vict. c. 92, and the certificate was dated the 22nd of December, 1843.

The company, on the 30th of December, 1843, paid the sum of £937 2*s.* 6*d.*, and thereupon the Commissioners, relying on the truth of the representations contained in the statutory declarations, and believing that the *Thomas Chalk* named in the certified extract was the same person as *Thomas Chalk*, of *Kingston*, granted to the trustees of the company an annuity of £100 1*s.* 6*d.* on the life of *Thomas Chalk*, of *Kingston*, that sum being the amount of an annuity on the life of a male person aged sixty-four years,

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purchasable for that sum according to the rates specified in the tables approved by the Lords of the Treasury. On the 30th of March, 1844, upon the transfer of a further sum of £953 £3 Consols, the Commissioners, acting on the faith of the representations contained in the declaration of *J. O. Hanson*, granted to the same trustees an annuity of £100 2*s.* on the same life.

The Commissioners granted other annuities to other companies on the life of *Thomas Chalk*, of *Kingston*, upon the faith of the evidence produced to them by the *Atlas Company*.

The annuities of £100 1*s.* 6*d.* and £102 2*s.* were paid to the trustees of the company half-yearly up to the 5th of January, 1869. Before each half-yearly payment the company produced to the Commissioners a certificate that *Thomas Chalk* was living at *Kingston* subsequently to the day on which the payment became due; and a declaration, signed by one of the trustees, that *Thomas Chalk*, named and described in the certificate, was the nominee upon whose life the annuities depended. The last of such certificates and declarations were dated the 7th and the 29th days of January, 1869. *Thomas Chalk*, of *Kingston*, died on the 2nd of February, 1869.

The company did not apply to the Commissioners for the payment of a fourth part of the annuities, after the death, to which the statute entitled them; nor did they give notice to the Commissioners of the death of *Thomas Chalk*. Some time after *Thomas Chalk's* death the Commissioners discovered that in the register of deaths at *Kingston*, *Thomas Chalk's* age was stated to be only eighty-two years, whereas, according to the certificate upon which the annuities were granted, he would have been eighty-nine. This led to an investigation of the discrepancy, and it was ascertained that *Thomas Chalk*, of *Kingston*, was a different person from *Thomas Chalk* whose birth was recorded in the register of the Society of Friends; and that *Thomas Chalk*, of *Kingston*, was born at *Brighton* in April, 1786, and was the son of *Thomas* and *Sarah Chalk*.

A long correspondence ensued between the Commissioners and the company, in which the company ultimately admitted the error, but stated that they were ignorant of it until their attention was called to it by the Commissioners, and that they were willing to make compensation upon the principle which the Commissioners

had adopted in other cases where there was no fraud or intentional misrepresentation, namely, by making up the sum which they would have originally had to pay to the Commissioners if the age of *Thomas Chalk* had been accurately stated, with interest. The Commissioners refused to accede to these terms, and the present information and bill was accordingly filed, praying for a declaration that the contracts for the purchase and sale of the annuities were void, and for an order that they might be cancelled, and that the company should pay to the Commissioners such a sum of money as would be equal to the difference between the amount of the moneys which had been paid to the company in respect of the annuities, with compound interest thereon at the rate of 3¼ per cent. per annum from the times of such payments, and the amount of the sums paid and the value of the stock transferred by the company to the Commissioners for the purchase of the annuities, with compound interest thereon at the same rate, from the times of such payment and transfer, and for consequential relief and costs of the suit.

The Defendant, on behalf of the company, stated in his answer that the name of *Thomas Chalk*, and every particular in respect of his age, the year in which born (1779), place of birth (*Barking*), and residence (*Kingston*), were supplied to the company by Mr. *Joseph Marsh*, of the *National Provident Institution*, who at the time (1843) said, "I have known this friend upwards of thirty years. I never knew or heard of his having a serious illness. Not a robust man, but appears the same as he was thirty years since;" that the certificate of birth of *Thomas Chalk*, mentioned in the bill, was furnished at the General Register Office, and that the company had no reason to suspect that the certificate referred to any other than *Thomas Chalk* of *Kingston*, who had been recommended by Mr. *Marsh* as a good life; that when the certificate of the death of *Thomas Chalk* was, in March, 1869, obtained, stating that he was eighty-two years, the company had not any reason to suspect that the discrepancy arose from anything more than an inaccuracy in that certificate, and that the error of date of birth was afterwards discovered; and he denied all fraud and intentional misrepresentation on behalf of the company, and submitted that the Commissioners ought, instead of filing the information and

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bill, to have rectified the contract under the 45th section of their Act.

The Vice-Chancellor was of opinion that the Commissioners were entitled to have the contract declared void and set aside *ab initio*, and made a decree in accordance with the prayer of the bill (1). From this decision the Defendant appealed.

(1) 1874. Jan. 26. WN(1874)21

SIR CHARLES HALL, V.C.:—

The foundation of the contracts entered into was that *Thomas Chalk* was sixty-four years of age. The Defendant's company furnished evidence of that representation, but it now appears that that representation was incorrect. The Commissioners have paid the annuities for a great number of years, and they now say that, as there was a misrepresentation, they have a right to have the contracts rescinded *ab initio*, and to have the parties to them placed in the position in which they were before the contracts were granted. The first question is, whether that is a sound proposition on the part of the Commissioners; and I think it is. It has been urged on the part of the *Atlas Assurance Company*, that the misrepresentation was not fraudulently made; and that the company took some pains to ascertain the truth of the statements which they made to the Commissioners in 1843. I think they did take pains to obtain it, and I do not impute to them anything like fraud or impropriety in what took place upon the occasion of the grants, but they did make a distinct misrepresentation, and having made it they must be held responsible. In the case of *Reese River Silver Mining Company* v. *Smith* (Law Rep. 4 H. L. 79), Lord *Cairns* said, "When I say a 'fraud,' I do not enter into any question with regard to the imputation of what may be called fraud in the most invidious sense against the directors. I think it may be quite possible, as has been alleged, that they [the Appellants in that case] were ignorant of the untruth of the statements made in their prospectus. But I apprehend it to be the rule of law, that if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue." That portion of what Lord *Cairns* said in that case is applicable to the present, and it might be applicable where the parties had made no inquiry at all; but here the company did obtain some information, which they believed to be true. They however stated that which was untrue, and having stated it their position is the same as if they had stated that which was known by them not to be true, and the Commissioners are entitled to relief as if actual fraud had been committed. Now quite irrespective of what was stated in *Rawlins* v. *Wickham* (3 De G. & J. 304), it is clear that if parties are induced to enter into a contract upon a statement which is untrue, they have a right to have the contract rescinded, and treated as nothing in this Court. In *Rawlins* v. *Wickham* there was actual fraud on the part of one partner, but not so on the part of the other, and therefore the observations of Lord Justice *Knight Bruce* with reference to the rights of the contracting parties, under such circumstances, are not strictly applicable to this case. Here it is not a question

(a) 5 Jur. N.S. 279

Mr. *Dickinson*, Q.C., Mr. *Kekewich*, and Mr. *H. D. Greene*, for the Appellant:—

Independently of the special powers given by the Act under which the annuities were granted, this is not a case in which the Court could have granted the relief asked by the Plaintiffs. There is no charge of fraud against the company, and it is clear that the mistake was an innocent one, and unless there is fraud the Court will not set aside *ab initio* a contract which has been actually executed: *New Brunswick and Canada Railway and Land Company* v. *Conybeare* (1). *Rawlins* v. *Wickham* (2) has no application to this case, because the parties cannot be put back into the position they were in before the contract. Unless this can be done the Court will not decree *restitutio in integrum*: *Western Bank of Scotland* v. *Addie* (3). In the present case the company ran the risk of the length of life of *Thomas Chalk*, and the purchase turned out profitable, while they were losers by others of their risks. If the life had dropped the next year after the annuity had been granted, the company could not have set the contract aside, on their discovery of the mistake, and recovered the money.

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how the Commissioners are to be compensated, but, whether they have a right to rescind the contracts altogether. In the case of *New Brunswick and Canada Railway and Land Company* v. *Conybeare* (9 H. L. C. 711) the circumstances were very peculiar, and the observations made in that case must be read with reference to the facts, and if that be done they will not be found to conflict with the decision in *Rawlins* v. *Wickham*. This case, I think, comes within what Lord *Eldon* would have considered fraud, not as understood in its offensive sense, but what the Court treats as fraud. It appearing, therefore, to me that the informant and Plaintiffs have made out a case of misrepresentation, which entitles them to have the contracts rescinded, I do not feel any difficulty in making the declaration which they ask, although the contracts have come to an end through the life dropping. As to the delay which has taken place, it seems to me that the Commissioners came to the Court as soon as they discovered what had happened. The paragraph in the 51st section of the Act, in reference to not coming here after three months, has nothing to do with a case of misrepresentation, which in this Court amounts to fraud. Being of opinion that the informant and Plaintiffs are entitled to the relief which they ask, and with costs, the declaration and decree must be according to the prayer.

(1) 9 H. L. C. 711.
(2) 3 De G. & J. 304.
(3) Law Rep. 1 H. L., Sc. 145.

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In the second place, the provisions of the Act are made expressly to meet a case of this nature. The 45th section of the Act gives power to the Commissioners to rectify mistakes. If this is not strictly compulsory, it was, at all events, in the contemplation of the Legislature that all mistakes where there was no fraud should be set right in this way, and the public have been induced to deal with the Commissioners on that footing. The present contract differs from a mere voluntary contract with a private person, because the Commissioners are bound to grant annuities according to the authorized tables; therefore if the company had in 1843 tendered the correct amount of purchase-money for an annuity on the life of *Thomas Chalk*, the Commissioners would have been bound to accept it. The company is willing to do that now, and to pay interest on the difference at £4 per cent. If the Plaintiffs are right, this is a mere money demand, and they ought to have sued for damages in a Court of Law.

[The LORD JUSTICE JAMES:—That objection does not apply to an information. The Queen can sue in whatever Court she likes.]

Lastly, we contend that, even if the Plaintiffs are entitled to relief, the Court was wrong in giving compound interest.

Mr. *Hemming* (the *Solicitor-General*, Sir *R. Baggallay*, with him), for the Informant and Plaintiffs, was only called on upon the question of interest:—

The reason for giving compound interest is, that the Commissioners would have been bound to invest and accumulate the money in the public funds.

SIR W. M. JAMES, L.J.:—

In this case I am of opinion that the decree of the Vice-Chancellor, with the variation that has been mentioned as to interest, must be affirmed. No doubt it is an unfortunate case for the *Atlas Assurance Company*, because I quite feel the truth of what has been said by the counsel for the company, that they have been running the risk all the time of this contract turning out to be a good one; and it has turned out to be a good one; and probably others which they had made with the Commissioners turned

out badly. But at the same time I think that this is not a defence open to them, having regard to the ground upon which the Attorney-General, on behalf of the Crown, seeks to set aside this contract. The *Atlas Assurance Company* produced to the Commissioners for the Reduction of the National Debt the representation which they are bound to produce under the Act of Parliament, and which was the very basis of the grant of the annuity which they obtained from these Commissioners. The Commissioners had no authority except to follow strictly the Act of Parliament and the tables prescribed for them; they were obliged to require a statement of age, and a verification of that age, as the basis and the essence of the contract on which they were proceeding to grant the annuity. The *Atlas Assurance Company* produced to them, it is true, without any fraud on the part of the directors of the *Atlas Assurance Company*, who, of course, would not be capable of any such fraud, and without any fraud on the part of the actuaries or officers managing for them, but through some most extraordinary mistake they did produce to the Commissioners for the Reduction of the National Debt a statutory declaration, of *John Oliver Hanson*. In this declaration he speaks of *Thomas Chalk* as residing at *Kingston*, and he is stated to be of the age of sixty-four, to have been born at *Barking*, and the names of his parents are given. It appears that all that was an entire mistake; that he was not of the age of sixty-four, but of a much younger age; that he was not born at *Barking;* and that his parents' names were not the names given there. The *Atlas Assurance Company* say now that they made that statement because they were misled by an agent whom they had employed to get up information for them as to good lives upon which they were to buy annuities. It is impossible to allow persons in this Court to escape from the effect of such positive representations of matters of fact upon the ground that they relied upon the representations made to them by their own agent, employed by them for the purpose of getting information for them. If a man makes a statement based upon the information which he has received from another, and the information is wrong, he is answerable for it, but he has his remedy over against the person who has deceived him. Here there was positive representation; the contract was based upon it. They entered

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into the contract under the Act of Parliament, and the basis of the contract having failed, the grant of the annuity appears to me to have been in violation of the Act of Parliament and void from the beginning.

It was said, however, that we ought not to treat it as void from the beginning, but as a thing capable of being amended under the 45th section of the Act. Under that section the Commissioners had the power to amend any mistake, and it is contended that we ought to treat it as if they had so amended it. It was said that the public were induced to enter into these transactions upon the notion that the Commissioners had such power. I quite agree it is very likely it was intended to be an assurance to the public that any mere mistake would not be harshly dealt with, that is to say, that in a proper case the Commissioners would amend it. But the public had only to rely for that upon the fact that the Commissioners were a public body who would be responsible to public opinion, the Legislature, and the Lords of the Treasury, for anything harsh or oppressive in what they did. But the Commissioners are the agents of the Government, subordinate to the Lords of the Treasury, and are not to be subject to this Court sitting as a Court of Appeal from their decision on a matter which they are left by the Act of Parliament to decide. No Court of Law or Equity is made a proper tribunal to correct any mistake which they may make. The Commissioners for the Reduction of the National Debt are persons entrusted by law with that authority, and if they exercise it wrongly, the person aggrieved ought to appeal to the proper authorities, and complain of their conduct. This Court cannot interfere because it may think that they ought to have taken a more liberal view of the case of the Defendant than they have done. The Attorney-General, on behalf of the Crown, and the Commissioners for the Reduction of the National Debt, say that there was a contract obtained upon false representations of fact, which make void the contract. It appears to me that we have no jurisdiction to substitute another contract for the contract so made. We can only set it aside as having been obtained improperly through misrepresentation; and that being so, the money paid by both parties under the contract must be given back. But we think that it should be repaid with simple interest

at £4 per cent. on both sides, according to the ordinary rule of this Court where accounts are taken in similar cases.

The appeal must be dismissed, and dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I entirely agree with the view taken by the Vice-Chancellor and the Lord Justice, that here there was a material misrepresentation of fact on which the contract was obtained. I am disposed myself to go even further than that, and to say that it was an essential part of the contract itself that this representation should be true. It is the same thing as in an ordinary case of a policy of life assurance, where certain representations as to the age of the person insured, and as regards his state of health, are made the basis of the contract, and if they are not true the insurance office is not bound by the contract. In this case there is no actual written contract or grant at all, there is merely a contract made by virtue of the Act of Parliament. Then, when we have looked at the Act of Parliament, it appears to me that the person who obtains the policy, whether on his own life or upon the life of another person, is obliged by the Act of Parliament to make a representation to the Commissioners of the age of the life upon which the annuity is to be granted, and he is obliged to send in a proper certificate of his baptism or birth, and then the Commissioners are to ascertain the price of consols at the time, and to calculate by certain tables, to be approved from time to time by the Lords of the Treasury, the value of the annuity to be granted; and they can grant the annuity upon those terms, and upon no other terms; and where, through the misrepresentation of the person who seeks to get an annuity upon the life, it is granted upon different terms, it appears to me the consequence is, that the Commissioners are not bound by that contract, but that they are in this Court entitled to have it rescinded.

Then with reference to what is said as to the 45th section of the Act, I am clearly of opinion that this does not make it compulsory upon the Commissioners to amend any contract in which there has been a mistake, but it only gives them the power to do so if they think proper. The words are in themselves permissive—that "it shall be lawful for them" to do it—and although it is not neces-

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sary to say whether this is such a case or not, it appears to me that there are many cases where it would be perfectly right in the Commissioners to refuse to amend any such contract, as, for instance, if it appeared that the misrepresentation as to the age had been an honest mistake at the time when it was made, but that the annuitant had discovered it some time afterwards, and had gone on for some years receiving the annuity without communicating the fact of the mistake to the Commissioners. It appears to me that that would be obviously a ground on which they would be entitled to refuse to make the amendment. But I think, also, that there may be cases of extreme negligence on the part of the person who procures the life in not ascertaining the right age, which may very well be a ground for the Commissioners refusing to amend the contract. I am not at all certain that the present may not fairly be said to be a case of that kind. I think at least you might expect that a person who wishes to insure the life of another, if he really does not know for certainty where the man was born, so that he might know where to get the certificate of his birth or baptism, would go to the man himself, and ask him how old he was and where he was born, so as to be certain that he got the right certificates. At any rate, I am of opinion that the 45th section is not compulsory, but it is in the discretion of the Commissioners whether they choose to amend the contract or not where there has been a mistake with respect to the age. If they decline to amend the contract, the consequence is, that there has been *ab initio* no contract binding upon the Commissioners, and they are entitled to have it not merely set aside, but they are entitled to have an account of what money is due to them calculated upon that basis.

Solicitors for the Appellants: Messrs. *Dawes & Son.*
Solicitors for the Treasury: Messrs. *Raven & Bradley.*

Ex parte SCHULTE. *In re* MATANLÈ.

L. J. M.
1874
Feb. 20, 27; *March* 6.

Bankruptcy—Execution Creditor—Protected Transaction—Bankruptcy Act, 1869, *s.* 95, *sub-s.* 3—*Notice of Act of Bankruptcy—Onus Probandi—Notice to Sheriff's Officer.*

In sect. 95, sub-sect. 3, of the *Bankruptcy Act*, 1869, "act of bankruptcy" means an act of bankruptcy which has been committed prior to the time of seizure.

The onus is on the execution creditor, who claims the protection of that section, to prove that he had no notice of any prior act of bankruptcy.

Notice to the sheriff's officers in possession under an execution of an act of bankruptcy is not notice to the creditor.

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, sitting as Chief Judge.

The facts, so far as they were undisputed, were shortly these:—

W. G. Matanlè was a box manufacturer in *Bunhill Row, London.*

On the 10th of October, 1873, he executed an assignment of his stock-in-trade, which was in fact the whole of his property, to *W. Elsam* to secure a previous debt.

On the 5th of November, 1873, *C. Schulte* obtained judgment against *Matanlè* in the Court of Exchequer for £26 12*s.* 6*d.* and £3 8*s.* costs.

On the 6th of November, 1873, a writ of *fi. fa.* was issued upon the judgment, and the sheriff seized the goods of the debtor.

On the 7th of November *Matanlè* filed a petition for liquidation by arrangement, and on the 8th of November Mr. *Champneys* was appointed receiver of the estate.

On the same day Messrs. *Anderson & Sons*, the solicitors for the debtor, wrote to Messrs. *Levy*, the sheriff's officers, the following letter:—

"8th Nov. 1873.

"Gentlemen,

"*Re W. G. Matanlè's* liquidation proceedings.

"*Matanlè ats. Schulte.*

"Yesterday we filed a liquidation petition, and to-day got Mr. *J. Champneys* appointed receiver and manager of the debtor's estate. We hereby give you formal notice that the said *G.*

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Matanlè, on the 10th day of October last, committed an act of bankruptcy by executing a bill of sale or assignment of the whole of his estate and effects to *W. Elsam*, of, &c., and that his solicitors are Messrs. *Van Sandau*, of 13, *King Street, Cheapside*, who have written us to say that under these circumstances if you attempt to sell it will be at your peril. We must also state, that if you do not withdraw, or if you attempt to sell under the circumstances, we shall hold you responsible on behalf of the receiver and the general body of the creditors. . . . .

"Yours truly,

"*Anderson & Sons.*"

The sheriff's officers received this letter on Monday morning, the 10th of November.

On the same day (the 10th of November) Mr. *J. E. Anderson*, one of the firm of *Anderson & Sons*, called on Mr. *Stafford*, *Schulte's* solicitor, in company with the receiver, and told him of the filing of the liquidation petition, and asked him to withdraw his execution. There was a conflict of evidence on the question whether he also told him of the act of bankruptcy committed by the execution of the bill of sale of the 10th of October, 1873.

Mr. *Anderson* and Mr. *Stafford* made affidavits, and they, as well as Mr. *Stafford's* clerk and the receiver, were examined *vivâ voce* before the Lord Justice on the appeal.

Mr. *Anderson* and the receiver stated that they mentioned to Mr. *Stafford* the bill of sale, and referred him to the case of *Ex parte Eyles* (1), on which they relied as shewing that his execution was invalid as against the trustee in the liquidation. But Mr. *Stafford* stated that neither the bill of sale nor the case cited was mentioned at that interview, and that they only discussed the effect of the liquidation petition on the execution, which Mr. *Stafford* refused to withdraw. Mr. *Stafford's* clerk also said that Mr. *Anderson* came again on Wednesday, and then referred for the first time to *Ex parte Eyles.*

On the afternoon of the same day (the 10th of November) Mr. *Anderson*, finding that Mr. *Stafford* would not withdraw the execution, paid the sheriff's officer £36 13*s.* for the debt and

(1) Law Rep. 16 Eq. 99.

expenses under protest, and *Schulte* received out of it what was due to him.

At the first meeting of creditors held shortly afterwards a resolution was passed adopting the liquidation and appointing a trustee.

Under these circumstances the Registrar ordered the sum of £36 13*s.* to be repaid to the trustee in the liquidation, and *Schulte* appealed from this order.

Mr. *Winslow*, Q.C., and Mr. *Finlay Knight*, for the Appellant:—

The execution was protected by the *Bankruptcy Act*, 1869, sect. 95, sub-sect. 3 (1). The notice to the sheriff's officer was not notice to the creditor. That was decided in *Ramsey* v. *Eaton* (2), and has never been questioned. The sheriff is the officer of the Court, not the agent of the creditor. The only question, therefore, is whether *Schulte* or his solicitor had notice of the bill of sale of the 10th of October, 1873. The evidence of Mr. *Stafford* and his clerk is clear, that although Mr. *Anderson* called at his office on the 10th of November, he did not mention the bill of sale, but only the petition for liquidation; and the petition, although an act of bankruptcy, was not prior to the seizure, and therefore notice of it was not sufficient to take it out of the protection of the 95th section: *Ex parte Rocke* (3); *Evans* v. *Hallam* (4).

Mr. *De Gex*, Q.C., and Mr. *Bremner*, for the trustee:—

The title of the trustee in liquidation dates back to the act of bankruptcy committed by the execution of the bill of sale of the 10th of October, 1873: *Ex parte Eyles* (5). The evidence is no doubt conflicting on the question whether notice of the bill of sale

(1) 32 & 33 Vict. c. 71, sect. 95, sub-sect. 3, enumerates, among transactions relating to the property of the bankrupt which are protected: "Any execution or attachment against the goods of any bankrupt executed in good faith by seizure and sale before the order of adjudication, if the person on whose account such execution or attachment was issued had not, at the time of the same being executed by seizure and sale, notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication."

(2) 10 M. & W. 22.

(3) Law Rep. 6 Ch. 795.

(4) Ibid. 6 Q. B. 713.

(5) Law Rep. 16 Eq. 99.

L. J. M. 1874 *Ex parte* SCHULTE *In re* MATANLÈ.

was given to *Schulte's* solicitor on the 10th of November. But in the first place, the onus is on the creditor of proving that he had no notice: *Pearson* v. *Graham* (1). Therefore, if the matter is doubtful, the Court will presume he had notice. Secondly, the probability is great that as Mr. *Anderson* had mentioned the bill of sale in his letter to the sheriff, he would also mention it to Mr. *Stafford*. But we also contend that it is not necessary under the 3rd sub-section of the 95th section, that the act of bankruptcy, of which notice is given, should be an act prior to the seizure. In the corresponding section, sect. 20 of the Bankruptcy Act, 1849, the words are, "notice of any *prior* act of bankruptcy by him committed." The 95th section of the present Act does not contain any such word. The creditor admits that he had notice of the filing of the petition for liquidation on the 10th of November, and we say that notice of any act of bankruptcy was sufficient to deprive him of the protection of the section. We also say that there was no sale in this case, and the property in the goods never passed out of the trustee, to whom they belonged: *Slater* v. *Pinder* (2).

SIR G. MELLISH, L.J.:—

6 Ch D 65 The question which arises in this case is, whether the trustee in liquidation is entitled to recover back the proceeds of an execution from the execution creditor, upon the facts which have been proved before me.

Primâ facie the title of the trustee in the liquidation refers back to the act of bankruptcy of the 10th of October, 1873, and the seizure by the sheriff was therefore the seizure of the goods of the trustee, not of the goods of the execution debtor. But the Appellant places reliance on the 3rd sub-section of the 95th section of the *Bankruptcy Act*, 1869, which protects, notwithstanding any prior act of bankruptcy, any execution or attachment against the goods of any bankrupt if the creditor who issues such execution or attachment had "not at the time of the same being executed by seizure and sale, notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication."

(1) 6 A. & E. 899. (2) Law Rep. 6 Ex. 228; 1bid. 7 Ex. 95.

Now the question arises on the section, which is partly one of law and partly one of fact, whether the creditor had in this case notice of an act of bankruptcy within the meaning of the section. Although the word "prior" is omitted in this section, I think it must refer to an act of bankruptcy prior to the seizure; because if, in fact, there was no act of bankruptcy prior to the seizure, the seizure (if under £50) is good; and I cannot think that the Legislature meant to make it material whether the execution creditor did or did not have notice of an act of bankruptcy, which was not prior to the seizure, and therefore was not itself material to the validity of the execution. Therefore it is necessary to decide the question, if, in fact, the creditor had notice of the bill of sale executed on the 10th of October.

On the authority of *Pearson* v. *Graham* (1) I am of opinion that the onus of proof lies on the execution creditor to shew that he had no notice of a prior act of bankruptcy, and I must therefore see whether the creditor in this case has discharged that duty. [His Lordship then carefully considered the evidence in the case, and said that although there was no reason to suppose that any of the witnesses had intentionally misstated what had occurred, yet on the balance of the testimony *Schulte* had not made out to his satisfaction that he had no notice of the bill of sale before the payment out of the execution which took the place of a sale by the sheriff. Therefore the sale must be declared invalid, and the creditor must return the money. The appeal must be dismissed with costs.]

Solicitors: Mr. *W. Stafford;* Messrs. *Anderson & Sons.*

(1) 6 A. & E. 899.

L. C.
and L. JJ.

1874

March 2.

MAYNARD *v.* EATON.

[1869 M. 180.]

Company—Transfer of Shares—Infant Transferee—Real Purchaser—Compromise of Action brought by Infant.

The Defendant purchased, through his broker, 300 shares in a joint stock company, and gave directions that they should be transferred into the name of his son, *G. E.* On the same day the Plaintiff instructed his broker to sell 100 shares in the company, and they were bought by the Defendant's broker, on his account, through a jobber in the ordinary way, and were transferred to *G. E.*, and were registered in his name. At that time *G. E.* was an infant, of which fact the Plaintiff was not aware. Soon afterwards the company was wound up voluntarily, and *G. E.* then brought an action by his father, as next friend, against the Plaintiff, who was an auditor of the company, charging him with fraud in selling the shares, knowing that the company was in an insolvent condition, and claiming damages. The action was compromised on the terms that all charges of fraud should be withdrawn, and that the purchase-money should be repaid to *G. E.* The liquidators on discovering that *G. E.* was an infant substituted the name of the Plaintiff for his as a contributory of the company. The Plaintiff then filed a bill against the Defendant, charging that he was the real purchaser of the shares, and that the Plaintiff was not aware of that fact when he entered into the compromise with *G. E.*, and claiming to be indemnified by the Defendant against all loss in respect of the transaction:—

Held, by *Malins*, V.C., that the Plaintiff was entitled to be indemnified, and that he was not precluded from maintaining the suit by the compromise with *G. E.*:

But *held*, by the Court of Appeal (reversing the decision of *Malins*, V.C.), that the compromise was an effectual bar to the Plaintiff's claim to relief, and that the fact of his ignorance that the Defendant was the real owner of the shares was immaterial.

THIS was an appeal from a decision of Vice-Chancellor *Malins*.

On the 4th of September, 1866, the Defendant, *Edward Eaton*, a drysalter at *Macclesfield*, being at the time a shareholder in the *Bank of Hindustan, China, and Japan*, gave directions to his broker, at *Manchester*, to purchase 300 shares of £100 each in that company, for the next settling-day, which was the 13th of September. On the 8th of September he wrote to the broker desiring him to have the shares transferred into the name of his son, *George Eaton*, whom he described as a drysalter, of *Upton*, *Maccles-*

field. On the 4th of September the Plaintiff, *Frederick Maynard*, who was the owner of 100 shares in the company, on which £26 had been paid up, gave directions to his broker to sell them for the 13th, and they were sold through a jobber in the ordinary way, at the price of £3 10*s.* per share, to the Defendant's broker, who gave the name of *George Eaton* as the intended transferee.

On the 14th of September the purchase-money, amounting to £350, was paid, and the shares were transferred to *George Eaton*, who was shortly afterwards registered as the holder of those shares.

At the time of the transfer *George Eaton* was an infant of the age of seventeen years, but the Plaintiff was not aware of his infancy.

On the 16th of November, 1866, the auditors of the company presented a report to the shareholders, giving an unsatisfactory account of the financial condition of the company; and soon afterwards *George Eaton* wrote to the Plaintiff, who was one of the auditors, stating that he was only eighteen years of age, and charging the Plaintiff with unfairness in the transaction, and claiming to have his purchase-money returned.

On the 10th of December, 1866, resolutions were passed for winding up the company voluntarily, and the winding-up was afterwards ordered to be continued under the supervision of the Court.

On the 14th of February, 1867, *George Eaton* commenced an action against the Plaintiff *Maynard* in the Court of Common Pleas by the Defendant, *Edward Eaton*, as his next friend, charging fraud against *Maynard* and failure of consideration for the sale of the shares, and claiming damages.

Maynard pleaded to the action, denying the charges of fraud, but after the cause was set down for trial the action was compromised on the terms of *George Eaton* withdrawing all the charges of fraud and *Maynard* repaying the purchase-money to him.

George Eaton's name was originally placed on the list of contributories of the company, but the liquidators afterwards removed it, and placed the Plaintiff's name in its stead. The Plaintiff alleged in his bill that the Defendant *Edward Eaton* was the real purchaser of the shares, and that the purchase-money, when re-

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paid under the compromise, passed into his hands. He also alleged that he did not know or suspect at the time of the compromise that the Defendant *Edward Eaton* was the real purchaser of the shares, or that they had been bought by his direction, but had discovered these facts subsequently. He therefore prayed for a declaration that the Defendant was the real owner of the shares, and that he was liable to indemnify the Plaintiff from all liability in respect of them.

The Defendant stated in his answer that he had given his son £1000 as an advancement, and that the shares were purchased for the benefit of his son, and paid for as part payment of that money. He also relied on the compromise of the action as a bar to the suit.

The Vice-Chancellor granted the relief prayed, being of opinion that the Defendant was the real purchaser of the shares, and that the compromise was not a bar to the suit (1). From this decree the Defendant appealed.

(1) 1873, Dec. 16. WN (1873) 224.

SIR R. MALINS, V.C., after stating the circumstances relating to the purchase of the shares, continued:—

Now there can be no doubt whatever that, in full belief that *George Eaton* was a person capable of binding himself, the deed of transfer was forwarded to the father. The father was the attesting witness, and I am bound to attribute to him a knowledge that these were shares of £100, upon which £26 only had been paid at that time, and, therefore, they were liable to £74 more, and making altogether £7400; and it is by his directions that this deed is prepared, by which a boy under eighteen years of age, with his full knowledge, is made to enter into a covenant which might involve an obligation of paying £7400 in money. Is it possible that any Court can justify that as a fair transaction on the part of the father? It is said that he bought the shares for his son; that he had given the son £1000, and, therefore, the shares being bought for the son, were properly transferred into the son's name. Upon that I must observe upon the evidence that I cannot consider that the shares were, in the sense in which the words have been used by the Defendant's counsel, bought for the son. They were bought by the father himself. Every one of the letters he wrote to the stockbrokers desires them to buy shares for him, and the name of the son is not in any one of them. They were bought for himself; and Mr. *Barker*, the broker who makes the affidavit, swears that from beginning to end of the transaction he never heard of the name of the son until the name was supplied to him by the letter of the 8th of September. He also says —and as a respectable man he could not do otherwise—that when the name of the son was supplied to him, he believed him to be of full age, and capable of binding himself.

Now, therefore, apart from other

Mr. *Cotton*, Q.C., and Mr. *Ince*, for the Appellant.

They were stopped by the Court, and the counsel for the Plaintiff were called on to shew why the compromise was not a bar to the suit.

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considerations which I shall have to advert to, this was a transaction in which Mr. *Maynard*, who was desirous of getting rid of his liability on the shares, ought to have got rid of it if fairness had been observed in the transaction; if the father did buy for the son he was bound to know, and did know, that the son was incapable of taking on himself the obligations attached to the transaction; if he bought for the son he was bound to put himself in the same situation as the son, and as the son could not perform the obligations, to perform them himself. I cannot look upon the transaction as a fair transaction. I do not say the father intended thereby to commit a fraud; but I am perfectly clear that he intended thereby to evade the liability that attached to the shares; and his object in putting the name of the son must have been that, if the thing went well, the son would have the shares; if it went ill, the vendor would have nobody to whom he could look for indemnity, but would have to bear the brunt of the battle himself.

Can anybody say that such a transaction as that ought to be approved of? A purchaser who buys shares with liabilities on them is bound to know, and the Court must attribute this knowledge to him, that the object of the seller may be to get rid of liability—the purchaser is bound to give the name of some person who will take on himself the liability, and therefore absolve the seller. That knowledge Mr. *Eaton* possessed. He was a shareholder in the company; he knew that it was in a tottering and weak condition—for a man who is a shareholder in a company whose shares have fallen from £26 to between £3 and £4, must know it is in a tottering condition, and a pure speculation whether the thing would go on or not—and, therefore, on every principle he was bound to know the obligations that were imposed on him, and that the seller sold them because he wanted to get rid of the liability, and the purchaser was bound to take the liability on himself. What is the consequence of this transaction? If Mr. *Edward Eaton's* name had been inserted, the question never would have arisen. Mr. *Maynard* fairly and honourably sold his shares in the market: he did not desire to keep them, and if he found a man who desired to have them, he expected to get rid of his liability. What is the consequence? The consequence contemplated by the father has taken place. The thing turned out disastrously. Mr. *Maynard* is to bear all the loss, and the father and son are to bear none; while, if the thing had gone to a high premium, they would have sold the shares. Mr. *Maynard* would have got rid of the liability, but he never could have had any advantage from the transaction. Therefore on the original transaction it being perfectly clear that the father was the purchaser, and that the father had imposed on him the obligation either to take the shares in his own name, or to give another name on the naming day, as he has failed to do that, he is not absolved from the obligation now to indemnify him, to the same extent as if he had done it in the transaction as it originally stood.

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MAYNARD v. EATON.

Mr. *Glasse*, Q.C., Mr. *Higgins*, Q.C., and Mr. *Grosvenor Woods*, for the Plaintiff:—

At the time of the compromise the present Plaintiff was entirely

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Now if Mr. *E. Eaton* had been a jobber, his liability is settled by decisions. Can it make any distinction if he is not a jobber? In my opinion, none whatever. My view of the subject may be seen in the case of *Coles* v. *Bristowe* (Law Rep. 4 Ch. 3). A jobber, the moment he purchases shares, as between him and the seller undertakes all the obligations of a purchaser; but by the custom of the *Stock Exchange* a jobber can get rid of his liability, as the decisions now stand, by giving another name. If he gives the name of an infant, he fails to comply with that requisition, and himself remains liable. Mr. *Eaton* is not a jobber, but a purchaser on the *Stock Exchange*; and as a jobber would have got rid of the liability by giving another name, it seems to follow that Mr. *Eaton* would have done just the same if he had given the name of an adult instead of an infant, and if that name had been accepted by the company as a person capable of relieving from liability, there would be an end of all question.

This is no longer open to speculation, because it has recently been settled by the Court of Appeal in the case of *Merry* v. *Nickalls* (Law Rep. 7 Ch. 733). It had been decided by the Master of the Rolls in *Rennie* v. *Morris* (Law Rep. 13 Eq. 203) that where a jobber or broker gave the name of an infant he absolved himself from any liability. That is overruled by *Merry* v. *Nickalls*.

In this case, therefore, when Mr. *E. Eaton* entered into the contract, he could not get out of its consequences except by supplying another name capable of accepting the transfer and paying for the shares. That he has not done, because he has given the name of a person who is absolutely incapable of accepting the transfer; and there being no acceptance of the transfer, nothing, in my opinion, can be more clear upon the facts which I have stated than that the Defendant *E. Eaton*, by entering into the contract, is liable to Mr. *Maynard*, the seller, to indemnify him against all future calls, and to take the shares as they stood at that time.

Now, the case so far being very simple, there are several defences set up. First, it is said that the son was the purchaser. I am clearly of opinion, for the reasons I have already stated, that I must regard not the son as the purchaser, but the father. The father transacted every part of the business. The brokers who transacted the purchase for him prove that they understood they were acting for him; and I am bound to say that, in my opinion, this is an after-thought, when he says, that out of the £1000 which he contemplated giving him (he does not pretend to say that he paid the money over to the son), he intended the price of these shares to be deducted. I am decidedly of opinion, whatever his intention may have been, he was acting on behalf of the infant, and he is not entitled to throw on the vendor the liability for the shares, but he is bound to stand in the same situation as if he had bought on his own account.

But then another defence is set up. It is said Mr. *Maynard* is not entitled to succeed in this suit because he has been guilty of fraud in the transaction, and he is by the answer distinctly

ignorant of facts that led to the filing of this bill. He made the compromise upon the faith of the son having bought the shares with his own money and for his own benefit. The bill does not

accused of fraud in the transaction. Now what is the fraud charged against Mr. *Maynard?* It is that, having been appointed an auditor of this company in 1865, he had made a report of its affairs dated the 10th of May, 1866, and was acquainted with the failing condition of the company. [His Honour then considered the facts in evidence on this point, and continued:—] It is plain that Mr. *Maynard* knew no more than Mr. *E. Eaton* himself did. To attribute to Mr. *Maynard,* under those circumstances, any fraud in the transaction is, in my opinion, totally unjustifiable. That part of the defence, therefore, fails. Indeed, I am bound to say the learned counsel who appeared before me scarcely pressed that point.

Then the only remaining defence is this: It appears that Mr. *E. Eaton,* carefully concealing from Mr. *Maynard* the nature of the transaction, and conccaling the fact that he was the purchaser of these shares, and keeping him in ignorance of this, took a step which I should say was a very unbecoming one. He brings an action in the name of his son as an infant, and he most improperly charges Mr. *Maynard* with fraud in the transaction, and seeks to get back the money on behalf of the infant. The case came on, and, under the advice of the counsel for Mr. *Maynard,* it is compromised on the terms of all charges of fraud being withdrawn and Mr. *Maynard* returning the money. Now on the other parts of the case I felt no doubt, but this part of the case is not absolutely free from difficulty.

Mr. *Maynard* states that his motive for compromising that action was not only that he felt he could not retain the money of an infant paid under such circumstances. He states that at that time the charges of fraud were utterly groundless; and I have already said I entirely agree with him on that subject. His affidavit states that the sale of the shares was made with perfect *bona fides,* and that he had not, at the time of such sale, any belief that the market price of shares in the company —at which the shares were sold—was more than they were worth. He had not, in fact, at that time commenced the investigation into the accounts of the company which led to the unfavourable report issued to the shareholders, and he was ignorant of the financial condition of the company. But there was at that time great excitement in the public mind on the subject of joint stock companies, occasioned by the then recent severe panic, and great suspicion of directors and auditors of companies; and he was advised that the public would be under the impression that, as one of the auditors of the company, he ought to have been acquainted with all its affairs, and that, if he defended the action by stating the actual facts, he would not only severely prejudice his own reputation as a professional accountant, but also give rise to an unfair outcry against auditors in general; and he accordingly consented to the above-mentioned compromise. He says that he did not then know or suspect that the Defendant was the real purchaser of the shares, and that they had been bought by him, or by his direction, and for his benefit; nor that he had paid for them out of his own money,

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attempt to set aside the compromise, but we contend that the Plaintiff's rights against the father are untouched by it. Whatever dealings he may have had with the son, while in ignorance that he

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nor that he had given the name of his son as transferee. He then states the circumstances as to the appointment of auditor, and of his receiving the report, and his total ignorance of there being anything unsound in the affairs of the company beyond what was stated in his report. If he had entered into the compromise with full knowledge of all the circumstances, I should have come to the conclusion that it was an actual bar to this suit. But nothing can be more clear than that, according to the doctrine of this Court, if a person is induced to enter into the compromise of a claim, and one party is in possession of facts which he suppresses from the other, this Court cannot allow that compromise to stand. I mentioned, in the course of the argument, the strongest illustration I knew of such a case; that was the celebrated case of *Gordon* v. *Gordon* (1 Mer. 141), decided by Lord *Eldon*. There being a doubt whether the elder brother was legitimate, he was induced to enter into a compromise, the second son being in possession of a fact which was not communicated to the elder brother. The suppression of that fact, trifling as it was, vitiated the whole transaction. So in this case, a compromise entered into by the father in the name of the son, suppressing the fact that the father had been the real purchaser would, in my opinion, if it had been in this Court, have entirely vitiated the transaction. On these grounds, I come to the conclusion that the compromise is not a bar to the suit.

Therefore, first, I decide in favour of the Plaintiff on the ground that the Defendant was bound to supply a good name, and not that of an infant; that Mr. *Maynard*, by the original transaction, had a right to require that of him; and, according to the words I quoted from Lord Justice *James's* decision, he has not given the name of a person who could take the contract from him and relieve Mr. *Maynard*. On that ground I am of opinion Mr. *Eaton* is bound to indemnify Mr. *Maynard* against the shares. The words of the prayer of the bill are "that it may be declared that, under the circumstances herein appearing, the Defendant ought to be considered and treated as the purchaser from the Plaintiff, and the owner of the said 100 shares." I do not know if those words "owner of the shares" are quite necessary. I was much pressed with the case decided by Lord Justice *James*, of *Castellan* v. *Hobson* (Law Rep. 10 Eq. 47). That was a case where *A.* bought shares on his own account; when the naming day came he gave the name of a servant incapable of bearing the brunt of the transfer. Lord Justice *James* there decided that was a vitiated transaction. *Hobson* was the real purchaser, though he gave the name of the servant as transferee. He made *Hobson* pay all the shares and indemnify the seller. He put it on the ground that the seller was a trustee for *Hobson*, the purchaser. If that be the true ground (and I entirely agree with it), it is equally applicable to this case, because, on the common principle of this Court, directly the vendor sells property he becomes trustee for the purchaser, and the purchaser becomes trustee of the money for the seller. So when Mr. *Maynard* sold the shares, he became trustee for Mr. *Eaton*. If the

was a mere trustee of the shares, he has done nothing to prevent him from claiming an indemnity against the real purchaser when he has discovered him. The vendor of shares is entitled to a transferee who will absolve him from liability, and as the father put in the name of an infant he must indemnify the vendor against the loss he has occasioned him: *Merry* v. *Nickalls* (1); *Castellan* v. *Hobson* (2).

LORD CAIRNS, L.C.:—

I think it better to assume, for the sake of argument, that the real owner of the shares was the father, and that he was using the name of his son as the purchaser, while intending to retain the benefit of them for himself. There might be some fine shade of difference between a father buying for himself and a father buying for his son, intending *bonâ fide* to give his son the benefit of the purchase. Putting aside such questions, I assume that the father intended to purchase these shares for his own benefit. But these shares were registered in the name of the son, and before the action was brought for the rescission of the contract the Plaintiff *Maynard* was informed that the transferee was an infant, and he knew that the shares had been registered in the name of the infant, and he must have known from the form of the action that the person bringing the action was an infant, as he sued by his next friend. The object of the action was clearly to have the contract rescinded under which the shares were purchased from the Plaintiff. Money counts were, indeed, added, but the action was really for that

shares had gone up £20, or £100 a share, the day after the contract, Mr. *Maynard* would have been a mere trustee for Mr. *Eaton*. Mr. *Eaton* would have had the advantage; if they went down he must bear the disadvantage. If the principle be that of trustee and *cestui que trust*, Mr. *Maynard* became trustee for Mr. *Eaton*, and Mr. *Eaton* is the *cestui que trust*, according to the case of *Castellan* v. *Hobson*; and on that principle he is bound to indemnify the trustee against all liability. That, therefore, is the first ground.

The second defence equally fails, for I am of opinion the compromise of the action is no bar to this suit.

I must, therefore, make a decree in favour of the Plaintiff. It should be in the same form as that in *Shepherd* v. *Gillespie* (Law Rep. 5 Eq. 293).

(1) Law Rep. 7 Ch. 733.

(2) Law Rep. 10 Eq. 47.

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purpose, and it was so treated by both parties. *Maynard* tells us in his bill that he was induced to consent to the compromise under which he paid back the purchase-money because he considered that the action, if tried, would raise the question whether his conduct had been correct with reference to the sale of the shares. However, the trial did not take place, and the compromise gave the Plaintiff in the action the full benefit of his action and the purchase-money was returned to him. It was argued, and it was the only way in which the compromise could be got rid of, that *Maynard* at that time was ignorant of the fact that the father was the real owner of the shares. Supposing it to have been so, how could that have been in any way relevant to the validity of the compromise? Suppose *Maynard* had been told in Court, when the compromise was about to be concluded, that the real owner of the shares was the father, I cannot imagine in what respect it would have been relevant, either in trying the action before a jury, or as to the terms of the compromise, whether the beneficial owner was the son or the father. The only person who could have brought the action was the infant whose name was on the register, and he was capable of maintaining it. The action having resulted in the rescission of the contract, the vendor had a right to be reinstated as the owner of the shares, and by being so reinstated he lost any right which he might have had against the father for any indemnity in respect of them. I cannot, therefore, think that the view taken by the Vice-Chancellor is right; I think that the compromise is an absolute bar to the suit, and that the bill must be dismissed with costs; but there will be no costs of the appeal.

SIR W. M. JAMES, L.J.:—

I am of the same opinion. I agree with the argument that the compromise would not have been binding if there had been any concealment of truth, or suggestion of what was false; but that must be understood as relating to what is relevant to the matter to be compromised. Whether the father or the son was the beneficial owner was immaterial to the question whether there was a valid sale of the shares. It was an action against the vendor by the real purchaser, whoever he might be, for the purpose of getting

rid of the contract; and whatever the vendor's motive may have been for consenting to the compromise, the effect of it was to put an end to the transaction, and to restore the shares to the vendor. Having thus put an end to the litigation, it is not competent to him to revive it now by bringing the bill against the next friend of the infant.

SIR G. MELLISH, L.J., concurred.

Solicitors for the Appellant: Messrs. *Stephens & Stephens.*
Solicitor for the Respondent: Mr. *J. Tucker.*

ATTORNEY-GENERAL *v.* TERRY.

[1873 A. 32.]

Navigable River—Obstruction—Nuisance—Injunction—Conservators—Benefit of Trade.

A wharf-owner drove piles into the bed of a river, extending the wharf so as to occupy three feet out of a breadth of about sixty feet available for navigation:—

Held, that this was such an obstruction as would be restrained at the suit of a municipal corporation empowered by Act of Parliament to remove obstructions.

Decree of the Master of the Rolls affirmed.

Held, per the Master of the Rolls, that an owner of land at the side of a public navigable river has no right to erect on the bed of the river, for the benefit of his own trade, any structure, whether any actual obstruction to the navigation of the river will or will not be thereby occasioned; and any benefit to his own trade is too remote to be held for the advantage of the public generally, and so to justify the erection.

Rex v. *Russell* (1) disapproved of by the Master of the Rolls.

THIS was an information filed at the relation of the mayor, aldermen, and burgesses of the town and port of *Sandwich* against the Defendant, *Henry Terry*, who was the owner of a mill and storehouses at *Sandwich*, and of a wharf or quay adjoining the same, and abutting on a part of the river *Stour*. The object of

(1) 6 B. & C. 566.

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the information was to restrain the Defendant from constructing any platform or piles so as to obstruct the navigation of the river.

The *Stour* is a small public navigable river forming the port or harbour of *Sandwich*, and by an Act of Parliament passed in 1847 (10 & 11 Vict. c. cxcvi.), the mayor, aldermen, and burgesses of *Sandwich*, were empowered to cleanse and deepen the river. By the 12th section it was provided that the corporation should not, without the consent of the Admiralty and the Woods and Forests, construct any works in the haven where and so far as the tide flows and reflows. Other powers were given to the corporation, and by the 37th section their water-bailiff was authorized to remove any floating timber or other obstruction.

It appeared that the Defendant, about the year 1857, had taken in a portion of the river on which his wharf was constructed, and had erected a quay or platform outside the wharf projecting two feet beyond it, and had placed some sloping piles within a short distance of the platform. No opposition was offered on the part of the corporation to these works.

In the year 1873 the Defendant took away the old platform and piles, and put in their place three strong piles at points in the bed of the river between high and low water, projecting about three feet three inches from the face of the old platform. Upon these piles he was about to erect a framework of the height of twenty-two feet as the support of an upper platform or stage, projecting four feet eight inches over the river, and communicating with his storehouses.

The Defendant had applied to the corporation for their permission to erect these new structures, which they had refused to grant, and, on his proceeding with the works, the present information was filed.

The information alleged that before the Defendant commenced his works the river opposite his quay afforded a channel of barely sufficient width for the convenient passage of vessels along the same, and that by the proposed works the width of the channel would be substantially diminished, and the navigation would be attended with difficulty, and, moreover, that the yards and rigging of the vessels passing along the same would be in constant danger

of coming in contact with the platforms and other works, and that, under the circumstances aforesaid, the Defendant's works would seriously interfere with and obstruct the public right to navigate the river, and would be to the damage and common nuisance of all Her Majesty's subjects using the same.

The information prayed that the Defendant, his workmen, servants, and agents, might be restrained from erecting or constructing, or causing or allowing to remain, any platform, piles, or other erections or works in or above the river *Stour* beyond the line of his quay, and from otherwise obstructing the navigation of the river or the public use of his quay, for the purpose of mooring of vessels along the same.

It appeared from the evidence that the river *Stour* at the point in question was seventy-six feet in width at high water, that it was deepest near the wharf, but that the bank opposite the wharf was shallow, so that only about fifty feet of the river from the wharf was available for the purposes of navigation, the depth beyond that distance being eight feet or less; that the vessels navigating the river were from eighteen and a half feet to twenty-one feet in beam, and that their draught of water was from eight to eleven feet.

There was a considerable amount of evidence on both sides as to the alleged obstruction of the river by the Defendant's works. Part of the Defendant's evidence was to the effect that the works complained of did not materially obstruct the river more than the quay which he had previously erected, and would in some respects be an advantage to the river.

The Master of the Rolls made a decree for an injunction (1), and the Defendant appealed.

(1) 1873, Dec. 10. W.N. (1873) 228

SIR G. JESSEL M.R., after stating the facts of the case, continued:—

This information is founded upon two complaints. The one complaint is that the obstruction caused by the erection of the structure of the Defendant will be a nuisance in the common acceptation of the term, that is, will actually impede the navigation of the river. The other ground is this: that whether that be so or not, the Defendant has no right to erect such structure, and ought to be restrained by injunction, quite independently of the fact of there being an actual nuisance or not. I think the information is entitled to succeed on both grounds.

As regards the law upon the subject, it is necessary to say a word or two; because an argument has been addressed

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Mr. *Fischer*, Q.C., and Mr. *E. Beaumont*, for the Appellant:—

We have a right to do all that is necessary to support our building. Moreover, our wharf is for the advantage of trade: *Hale, de Por-*

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to me to this effect: that, admitting that it is some nuisance, or a little nuisance — that is, some interference with navigation—yet the rights of the public as to restraining a nuisance are confined within reasonable limits, and that there may be such a public benefit arising from the works in question as would entitle the person or body erecting those works to say that the public benefit far more than counterbalanced the small impediment to navigation which the works occasion.

It was said that that had been decided in the well-known case of *Rex* v. *Russell* (6 B. & C. 566). In my opinion that case is not law, and it is right to say so in the clearest terms; because it is not well that cases should continue to be cited which have been virtually overruled, although the Judges have not said so in express terms. In that case there had been some staiths erected in the river *Tyne*, and a very eminent Judge of those days, Mr. Justice *Bayley*, in charging the jury, had pointed out that they were erected simply for the purpose of carrying on trade. He said (6 B. & C. 570) that "the staiths were not merely a private benefit, for that by means of them the coals were brought to market at a smaller expense and in a better condition, in both which respects the public were benefited;" and he then left to their decision the following questions: "Were the staiths erected in a reasonable place? Was there a reasonable space left for the public navigating in the *Tyne*? Were the staiths a public benefit? Did the public benefit countervail the prejudice done to individuals?" The jury said that in consequence of this direction they found the Defendants not guilty.

The case was brought before the full Court, consisting of the same Judge, Mr. Justice *Bayley*, and two other very eminent Judges, Mr. Justice *Holroyd* and Lord *Tenterden*. Mr. Justice *Bayley* adhered to his own opinion; Lord *Tenterden* differed; Mr. Justice *Holroyd*, though he came to the conclusion the verdict should not be disturbed, did not lay down the law quite in the same terms as Mr. Justice *Bayley* as regards the public benefit. As I understand it, he only put the law to this extent, that the public benefit might possibly countervail the public injury; for really they are both public, so that, taking it on the whole, the public was benefited.

That case came under discussion in the case of *Rex* v. *Ward* (4 A. & E. 384), where Sir *William Follett*, whose interest it was to support *Rex* v. *Russell* as far as he could, thus speaks of it (4 A. & E. 395): "The doctrine of *Rex* v. *Russell* need not come under discussion; nor is there any conflict of authorities. Erections may be made in a harbour, below high-water mark, and in places where vessels might perhaps have sailed; and the question whether they are a nuisance, or not, will depend on this: whether, upon the whole, they produce public benefit; not giving to the terms 'public benefit' too extended a sense, but applying them to the public frequenting the port."

I take it that that statement in argument of Sir *William Follett* was a correct statement of the law. Lord *Denman*, in giving the opinion of the full Court of Queen's Bench, says (4 A. & E. 402): "The greatest weight is

tibus (1). No jury would convict us on an indictment for nuisance. The obstruction is very trifling, and the river is narrower above

due to the authority of Mr. Justice *Bayley*, who thus charged the jury, and afterwards upheld his opinion in this Court; and no person can hesitate to ascribe every quality of an excellent judge to Mr. Justice *Holroyd*, who agreed with him in thinking that the rule for a new trial for misdirection ought to be discharged. But, when we examine the grounds of this opinion, as delivered by the latter, they will not be found to support in any degree the proposition just noticed in the summing-up"—that is, in the summing of Mr. Justice *Bayley*—"on the contrary, he plainly considers the topic to have been introduced as an answer to some observations invidiously made to the Defendant's prejudice, by the counsel who conducted the prosecution, and thinks that it must be qualified throughout the summing-up, and even to its close, by its connection with that argument. Mr. Justice *Bayley* himself, who delivered his judgment after Mr. Justice *Holroyd*, takes a much wider range, maintaining the right to estimate the balance of public benefit and public inconvenience, and to take into the account of the former the advantages that may be derived from the change by any part of the public. He takes for an example the purchasers of coals sent from the indicted staith to a distant market. Lord *Tenterden* thought it wrong to submit such extensive views to the jury, and that the question ought simply to have been, 'whether the navigation and passage of vessels over this public navigable river was injured by those erections.'"

Now that is the final judgment; but there had been a previous judgment, a short judgment, as to the whole of the case, and what Lord *Denman* said was this (4 A. & E. 400): "My understanding at the trial certainly was, that the question was much the same as that in *Rex* v. *Russell* (6 B. & C. 566), a case the authority of which has been much doubted, and is perhaps likely to be more so as it is further examined." So that it must be taken to have been the opinion of the full Court of Queen's Bench, in Lord *Denman's* time, that the summing-up of Mr. Justice *Bayley* in *Rex* v. *Russell* could not be supported; he does not say so in distinct and clear terms, but the effect of the judgment of the full Court was, that they agreed with Lord *Tenterden* and disagreed with Mr. Justice *Bayley*. What really were the points on which they disagreed? I think they were two, and I think on those two points the charge of Mr. Justice *Bayley* was erroneous. In the first place, I think the benefit, whatever it is, must be a public benefit to the same public, that is, the same public who use the navigation, or, as it was put by Sir *William Follett*, "the public frequenting the port." In the next place, I think that the benefit to the public must be a direct benefit, whereas the benefit which he was considering was an indirect, and, as it appears to me, too remote a benefit. It was that coals came to the *London* market in rather a better condition, and were possibly sold at a lower price. That does not appear to me to be a public benefit in the sense of the term in which it ought to be used when considering the question of nuisance.

Then, it may be asked, what is a

(1) Hargr. Tracts, 85.

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and below. Moreover, the Plaintiffs are not conservators, and have no right to file this information.

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public benefit in my view? I say it is a benefit of a similar nature, shewing that on the balance of convenience and inconvenience the public at that place not only lose nothing, but gain something by the erection. There are two cases in the books which will illustrate my meaning, and I think fairly shew what sort of public benefit it is. The first is this: In the case of a tidal harbour of irregular shape it may be desirable to straighten the sides, the result of which would be, of course, in the parts where you take away the water-way, to diminish the area usable for navigation; in those parts where you add to the water-way you would increase the area. If, in the course of this straightening, the whole of the harbour is made larger and more commodious, then I think the public benefit gained at the particular point where the navigable water is narrow overbalances the public injury, and, in that sense, that improvement of the harbour would not be a nuisance; and that is what I understand Lord *Hale* intends to say in the passage which has been referred to. Another case is this, which also appears in reported cases: Suppose you have a navigable river, and it is necessary to cross it by a bridge, and the river is too wide to allow of a bridge of a single span, you must then put one or more piers into the middle of the river, and, of course, according to the extent you introduce bridge piers or bridge arches into a navigable river, you to some extent diminish the water-way, and to some extent, perhaps to a more or less material extent, obstruct the navigation. But it is for the public benefit at that spot that a public road should be carried over the river by the bridge, and that benefit may so far exceed the trifling injury, if injury it be, to the navigation, that on the whole a Court of justice may fairly come to the conclusion that a public benefit of a much greater amount has been conferred on the public than the trifling injury occasioned by the insertion of the piers into the bed of the river. In that case also it would be a public benefit that would counterbalance the public injury. I give those as illustrations, but I think it must be confined, as put by Sir *William Follett* in his argument, to cases of public benefit, and not used in too extended a sense.

In this case really I have no evidence whatever of benefit to the public. The Defendant is doing this for the purposes of his own trade; it is too remote a benefit to the public to say that the encouragement of the trade of a single individual is therefore a benefit to the public. It seems to me to be an extravagant use even of the doctrine, had it been sound law, laid down by Mr. Justice *Bayley* in the case of *Rex* v. *Russell*, and therefore I cannot for a moment listen to the argument of the Defendant on those grounds. Is there a nuisance? Counsel for the Defendant admitted a little nuisance, and I take it that a little nuisance will support an information. The doctrine of this Court is, no doubt, *de minimis non curat lex*. But that must mean something of a very trifling character. The instance given by Lord *Cranworth* in a case to which I am about to refer was merely putting in a single stake in the stream, something too trifling to bear discussion; but where there is really an interference with the navigation, of course it is not within that doctrine. Then, is there an inter-

Mr. *Roxburgh*, Q.C., and Mr. *E. P. C. Hanson*, for the relators, were not called upon.

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ference? Upon that, when you come to look at the facts, there really does not seem to be much room for argument. I cannot consider the comparison which has been so often suggested, both in the evidence and in the argument, of the illegal state of things produced by the Defendant before he constructed these works, and the state of things produced by the new works. I must look upon it that the Defendant has not acquired a right to keep his platform or his sloping piles there, and has chosen to remove them; that the case must be treated exactly in the same way as if they had never existed; and therefore the question is, whether erecting these piles, and putting up this platform in this narrow river, can, to a person of ordinary common sense, on the facts which I am about to state, be considered as an interference with the navigation. [His Honour then reviewed the evidence as to the width of the river, the size of the vessels navigating it, and the probable obstruction which the Defendant's works would occasion, and continued:—]

I am of opinion that this is a material obstruction to the navigation, and would be indictable at law as a nuisance. If it was necessary to rest my decision on that, I should have no difficulty in doing so; but I do not think it is necessary, for there is another ground also, and a ground of very great importance, upon which I say the informant is entitled to a decree, and that is this—that no man has a right to put an obstruction in the bed of a navigable river. As I understand the law, it is not an answer to say that at this moment the obstruction is not a nuisance: it may become so; a change may take place either in the mode of navigating the river, that is, as regards the vessels using the river, or a new mode of constructing vessels may be adopted, or a change may take place as regards the form of the harbour itself by removing an obstruction, or otherwise, which might make that navigable which was not before navigable in any useful sense. If you allow the obstruction to remain, you allow the person erecting the obstruction to obtain by law, by reason of the lapse of time, a right to keep the obstruction there, so that when the time arrives at which the obstruction really impedes the navigation, you will not be able to remove it. It is for that reason so important that a person complaining of the obstruction, though not able to maintain an indictment for nuisance because an actual nuisance has not yet been committed, should be able to come to a Court of Equity and ask that Court to restrain the continuance of that obstruction.

This matter has been considered several times. I will refer to two cases on the point, though they do not actually relate to a public navigable river. The first is a case of *Bickett* v. *Morris* (Law Rep. 1 H. L., Sc. 47).(a) That decided this—that in the case of a private river, where there were two riparian owners, each entitled to the soil *ad medium filum aquæ*, both entitled to the uninterrupted flow of water, neither of those could erect on his own land any structure which might be eventually, though not then, an obstruction to ~~navigation~~. Now, as Lord *Westbury* put it, this decision establishes the important principle that an encroachment on the *alveus* of a

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Cas. t. Jr. N.S. 803.[1]

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LORD CAIRNS, L.C. :—

In disposing of this case I shall refer merely to those facts as to which there is no controversy; and I shall not have occasion to refer to those as to which there is a conflict of testimony.

The *Stour* is a navigable river, and is apparently much used by ships trading to the town of *Sandwich*. The navigation of the river has been placed under the guardianship of the Corporation of

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running stream may be complained of without the necessity of proving that damage has been sustained or likely to be sustained, the reason being that which I have given—that you cannot tell what may happen hereafter, and that the obstruction itself being allowed to remain will gain for the obstructor a prescriptive right. That was a Scotch case, but it was decided by English Judges, and expressly on the ground that the Scotch and English law was the same; so it is an authority for English law. That is a case to a certain extent *à fortiori*, because there the man was erecting a structure on his own soil, the half part of the river belonging to him.

The point was considered as regards a navigable river in the case of *Attorney-General* v. *Earl of Lonsdale* (Law Rep. 7 Eq. 377), where Vice-Chancellor *Malins* distinctly held that the same principle extended to a navigable river as regards interfering with navigation, and that in a case where the rights of the Crown had passed by grant to the Defendant, Lord *Lonsdale*. There, again, it was a more favourable case for the Defendant, because he was building on his own soil. In the present case the Defendant has no right to put a stake in the soil of the Crown. It is a trespass to interfere with the soil. He is in a much more unfavourable position than the Defendant was in either of the cases to which I have referred; but in those cases it was said, even without proof of damage either sustained or likely to be sustained, "You have a right to prevent that which may hereafter, under altered circumstances, become a nuisance, without proving that it is likely to become so." Here we have an *à fortiori* case; here is a case in which the Defendant has been putting these things (they are called "piles"; they are structures of very great solidity and strength—very substantial structures indeed—with a platform above them) into the soil of a navigable river, where the soil belongs to the Crown—a structure not of a trivial character, but, as it appears to me, a very substantial structure indeed; and I am not prepared to say that, even if the nuisance had not been proved, there is no apprehension of a nuisance.

It seems to me that the public body who have the guardianship of the river should have applied to the Attorney-General to stop the encroachments at the beginning. It perhaps shews how very desirable it would have been to stop him at the very beginning, that this Defendant thinks that now to be a hardship which he would not have considered a hardship if he had been stopped fifteen years ago, when he first began the encroachments. I have no hesitation in granting an injunction according to the prayer of this information, and in ordering the Defendant to pay the costs of the suit.

Sandwich by an Act of Parliament passed in the year 1847. By one section of this Act the corporation themselves cannot, without the consent of the Admiralty, construct any work in the river below high-water mark; and by another section the water-bailiff, an officer of the corporation, is authorized to remove any obstruction in the river. This Act, therefore, shews that it was thought of great public importance to preserve unimpeded the navigation of the *Stour*, and that a special duty devolved upon the Corporation of *Sandwich* to keep the river free from obstruction.

[His Lordship then stated the facts of the case, as shewing that out of a width of about sixty feet available for navigation the Defendant had taken three feet.]

It was argued before us that this was no real obstruction, and that therefore the Court should not interfere; but this appears to me to be exactly one of those cases in which the obstruction should at the outset be challenged by those who are conservators of the river. If three feet be taken at one time unchallenged, then six feet might be taken at another time. I cannot say that there might not be an encroachment of so trifling a nature that this Court would not interfere, but a subtraction of three feet from sixty feet is a tangible and substantial interference with the navigation, and is a subtraction which ought to be challenged, and which ought to be restrained by this Court. An error as to the towpath has *per incuriam* crept into the decree, and must be corrected, but with that exception I think that the decree of the Master of the Rolls is right, and that the appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. It appears to me that the piles constitute an indictable nuisance, which a jury, properly directed by a Judge, must find to be such. The piles have been placed in the stream of a navigable river, which is so narrow that every foot is wanted for navigation. It is true there may be spots in the river where space is not wanted, and where that which would otherwise be a nuisance might not be such an obstruction of the highway as to make it the duty of this Court to interfere; but it appears that the space is actually wanted for the purposes of navigation, and in such a case there is no difference between a highway on land and a

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highway on water. It is no answer to say that there is room for the ships, and that if they are navigated with skill and care there will be no obstruction. Those who use the river are entitled to say that they have a right to the whole of the space; and in my opinion it is not any answer that the obstruction only occurs at certain times of the tide, and that in some respects the alteration would be advantageous. The advantage of one person cannot be set off against the disadvantage of another. If this is an indictable nuisance there must be a remedy in the Court of Chancery, and that remedy is by injunction.

SIR W. M. JAMES, L.J.:—

I entirely concur. Where a public body is entrusted with the duty of being conservators of a river, it is their duty to take proceedings for the protection of those who use the river.

Solicitors for the Relators: Messrs. *Prior, Bigg, & Co.*
Solicitors for the Defendant: Messrs. *Lowless, Nelson, & Co.*

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Feb. 20, *April* 15, *May* 8.

Ex parte VILLARS. *In re* ROGERS.

Bankruptcy—Execution—Seizure and Sale—Act of Bankruptcy—Payment of Proceeds to Execution Creditor—Subsequent Bankruptcy—Bankruptcy Act, 1869, *ss.* 6, 87, 95—*Sales made on different Days—Sale to Execution Creditor.*

An execution levied by seizure and sale of a trader's goods for a debt exceeding £50, although an act of bankruptcy, is not for that reason necessarily a void proceeding; and if the execution creditor had no notice of a prior act of bankruptcy, and no notice of a petition for adjudication is given to the sheriff under the 87th section of the *Bankruptcy Act*, 1869, within fourteen days after the sale, the execution creditor is entitled to the proceeds of the sale notwithstanding a supervening bankruptcy.

The sheriff may make a valid sale by private contract of goods seized under an execution, to the execution creditor.

If the sheriff sells goods seized under the same writ on different days, all the sales will be considered one transaction.

Slater v. *Pinder* (1) considered.

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, acting as Chief Judge.

(1) Law Rep. 6 Ex. 228.

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James Rogers was a dealer in fancy goods in the *Lowther Arcade* in *London*, and had his private residence at *Fulham*. On the 27th of May, 1873, he gave to *W. J. Villars* a joint promissory note of himself and two other persons for the payment of £600 on demand, as security for a debt owing to *Villars* for furnishing his house at *Fulham*, and certain advances in cash.

On the 30th of June, 1873, *Villars* recovered judgment against *Rogers* in an action on the promissory note for £600, interest and costs. Execution was issued on the same day, and the sheriff's officer went to *Rogers'* shop in the *Lowther Arcade*, where he found the sheriff in possession under a previous writ for £43. The officer gave the man in possession notice of his writ, and served him with a copy of it.

On the 1st of July the sheriff seized *Rogers'* goods in his house at *Fulham*.

On the 4th of July the sheriff, with the consent of *Rogers*, sold the furniture at *Fulham* to *Villars*, by private contract, for £363 3*s*., and on the 7th of July, in like manner, he sold the goods at the shop in the *Lowther Arcade*, the prior execution having been previously satisfied, to *Villars* for £338, making in the whole £701 3*s*. Separate bills of sale of the goods in the two houses were executed by the sheriff to *Villars*, and were duly registered, and *Villars* paid the price by two cheques, one for £605 3*s*., which was the amount of his own debt and costs, and the other for £96, which included the sheriff's charges.

The sheriff kept the cheque for £605 3*s*. for the fourteen days required by the 87th section of the *Bankruptcy Act*, 1869, and then handed it back to *Villars* in satisfaction of his debt and costs.

On the 1st of August another creditor presented a petition for adjudication of bankruptcy against *Rogers*, the act of bankruptcy alleged being the seizure and sale under *Villars'* execution, and he was adjudicated bankrupt.

The Registrar, on the application of the trustee, made an order declaring that the two bills of sale of the 4th and 7th of July, 1873, were void as against the trustee, and ordering that *Villars* should deliver up the furniture and other goods purchased by him from the sheriff, and if any had been subsequently sold by him, that he should account for their value.

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From this decision *Villars* appealed, and the appeal was heard before Sir *G. Mellish*, L.J., on Feb. 20.

Mr. *Little*, Q.C., and Mr. *Robson*, for the Appellant:—

The question turns upon the effect of the 87th section of the *Bankruptcy Act*, 1869 (1).

With respect to the goods sold, it is quite clear that the sheriff can give a good title to them either before or after the fourteen days have expired, otherwise there could be no sale at all by the sheriff. The fact that the execution creditor was himself the purchaser makes no difference; for the restriction imposed upon the sheriff by the 73rd section of the *Bankruptcy Act*, 1861, not to sell otherwise than by auction, has been removed, and the sheriff may sell in whatever manner he thinks best. The order of the Registrar is therefore clearly wrong as to the goods. Then, with respect to the proceeds of the sale, we say that after the fourteen days have expired the payment by the sheriff to the execution creditor is valid. By the 73rd section of the *Bankruptcy Act*, 1861, although the seizure of the goods was made an act of bankruptcy, it was expressly provided that the sheriff shall, "at the end of seven days after the sale, pay over the proceeds, or so much as ought to be paid, to the execution creditor, who shall be entitled thereto notwithstanding such act of bankruptcy, unless the debtor be adjudged a bankrupt within fourteen days from the day of the sale." It is true that there are no such words protecting the creditor in the present Act, but it is not reasonable to suppose that the Legislature

(1) 32 & 33 Vict. c. 71, s. 87:—

"Where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding fifty pounds, and sold, the sheriff, or, in the case of a sale under the direction of the County Court, the high bailiff or other officer of the County Court, shall retain the proceeds of such sale in his hands for a period of fourteen days, and upon notice being served on him within that period of a bankruptcy petition having been presented against such trader, shall hold the proceeds of such sale, after deducting expenses, on trust to pay the same to the trustee; but if no notice of such petition having been presented be served on him within such period of fourteen days, or if such notice having been served, the trader against whom the petition has been presented is not adjudged a bankrupt on such petition, or on any other petition of which the sheriff, high bailiff, or other officer has notice, he may deal with the proceeds of such sale in the same manner as he would have done had no notice of the presentation of a bankruptcy petition been served on him."

meant to alter the law in that respect. If so, the result will be that an execution for sums above £50 will become practically useless, as the creditor will not be safe against being called on to repay the money at any time within twelve months. The 87th section says the sheriff is to "deal with" the money, which implies that he can make a valid payment; and the most reasonable construction of the Act is, that although seizure and sale is an act of bankruptcy for other purposes, it is not so as regards the purchaser under the sale or the creditor who receives the money from the sheriff: *Morland* v. *Pellatt* (1); *Hernaman* v. *Bowker* (2).

Mr. *De Gex*, Q.C., and Mr. *Romer*, for the trustee:—

The 6th section, sub-sect. 5, of the *Bankruptcy Act*, 1869, makes the seizure and sale an act of bankruptcy, and, consequently, everything done under it must be void as against a subsequent bankruptcy within twelve months, unless there is something in the Act to control it. The 87th section is only for the protection of the sheriff. That was expressly laid down in *Ex parte Pearson* (3). It may be that a purchaser from him is protected, because the act of bankruptcy is not committed till the sale is completed; but there is nothing in the section to protect the creditor who receives the money. The omission of the words which occur in the corresponding section in the *Bankruptcy Act*, 1861, is a clear indication of a change of intention of the Legislature in this respect: *Ex parte Rayner* (4). The 95th section, sub-sect. 3, which protects executions made *bonâ fide* without notice, is made expressly subject to the provisions contained in this section, and does not apply to executions which are in themselves acts of bankruptcy: *Ex parte Key* (5). At all events the sale on the 7th of July is void, for there had been a previous sale on the 4th of July.

Mr. *Little*, in reply.

SIR G. MELLISH, L.J.:—

This case raises an important question as to the effect of the 87th section of the *Bankruptcy Act*, 1869. The facts were shortly

(1) 8 B. & C. 722.
(2) 11 Ex. 760.
(3) Law Rep. 8 Ch. 667.
(4) Ibid. 7 Ch. 325.
(5) Law Rep. 10 Eq. 432.

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these: The Appellant had obtained judgment and sued out execution against *Rogers*, and on the 30th of June and the 1st of July, 1873, the sheriff's officer executed the writ at his houses in the *Lowther Arcade* and *Fulham*. It appears from the evidence of the sheriff's officer, that on the 30th of June he found an officer in possession at the *Lowther Arcade* under a previous writ, and that he gave him notice of the Appellant's writ, and left him a copy of it. That, in my opinion, amounted to a seizure on that day under the Appellant's writ. Then the sheriff sold the goods at the two houses to the Appellant, and gave him two bills of sale on the 4th and 7th of July (the previous execution having been settled), and the Appellant gave cheques for the amount to the sheriff, who kept one of the cheques till the fourteen days required by the statute had elapsed, and then handed it to the Appellant in satisfaction of his debt.

The question to be decided is, whether the execution is valid *quâ* the execution creditor himself. The 5th sub-section of the 6th section of the *Bankruptcy Act*, 1869, lays down as an act of bankruptcy, "that execution issued against the debtor by any legal process, for the purpose of obtaining payment of not less than £50, has, in the case of a trader, been levied by seizure and sale of his goods." There can be no doubt, therefore, that on the 4th of July, and again on the 7th of July, an act of bankruptcy was committed by *Rogers*. Supposing this sub-section had not been qualified by any other part of the Act, what would have been the effect of the execution? Whatever is by the statute made an act of bankruptcy is entirely void as against the trustee in bankruptcy; therefore, if the 6th section had been unqualified, that levy by seizure would have been altogether invalid against the trustee, and the execution creditor could not have derived any benefit from it. But that enactment is qualified by the 87th section, and the question is, to what extent it is so qualified. [His Lordship then read the section, and continued:—]

In the first place, I am of opinion that this section justifies the sheriff in selling the goods seized. He is to go on and sell notwithstanding it is an act of bankruptcy; and I think it was clearly the intention of the Legislature to enable him to make a good transfer of the property in the goods to the purchaser. It could

not have been intended that if there was a bankruptcy within fourteen days, the trustee under the bankruptcy, if he found that the expenses of the sale by the sheriff had been considerable, or if he thought he could make more of them by selling them at another time, should be able to go to the purchaser and say: "They are my goods, and you must give them back." If so, the purchaser would be entitled to an indemnity from the sheriff, which is never the case, as the sheriff gives no warranty with the goods.

It appears to me therefore clear that the trustee is only entitled to the proceeds of the sale after deducting the sheriff's expenses. If this were not so, the sheriff could never sell at all.

Then with regard to the passing of the property in the goods, I do not think that it makes any difference that the sale was made to the execution creditor himself. The law does not now compel the sheriff to sell by auction, nor is there anything to restrain him from selling to the creditor, who cannot be in a worse position than any other purchaser. If a petition had been presented within fourteen days, the only claim which the trustee could have had would have been to make the sheriff hand over the proceeds of the sale to him, and I think it follows that he cannot be entitled to more than the proceeds if the petition is not presented till after the fourteen days have elapsed.

Nor do I think it makes any difference that the sale in this case was made by two bills of sale on the 4th and the 7th of July. It appears to me that according to the true construction of the 87th section, the sheriff is to go on selling till he has realized enough to satisfy the execution, and if the debtor's goods are in different houses, and the sheriff sells the goods in one house on Monday, it cannot be intended that he should stop, and not sell the goods in the other house on Tuesday. In my opinion all sales made to satisfy one writ, after the goods have been seized under it, are within the protection of the 87th section, whether made on the same day or not.

We come then to what is the real question in the case, Who is entitled to the proceeds under the circumstances of the present case? Sub-sect. 5 of the 6th section makes every sale by a sheriff an act of bankruptcy, and therefore void as regards the execution

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creditor. Then the effect of sect. 87 is that the sheriff shall be protected, and that the purchaser shall be protected, but it does not say that the execution creditor shall also be protected. During the fourteen days the money belongs to the trustee if notice of a petition in bankruptcy is given within that time; therefore in that case it is void as regards the execution creditor.

Therefore the real question is, What is the meaning of the words at the end of the 87th section? They are these: "But if no notice of such petition having been presented be served on him within such period of fourteen days, or if, such notice having been served, the trader against whom the petition has been presented is not adjudged a bankrupt on such petition, or on any other petition of which the sheriff, high bailiff, or other officer has notice, he may deal with the proceeds of such sale in the same manner as he would have done had no notice of the presentation of a bankruptcy petition been served on him." No doubt those words protect the sheriff, but do they also mean that the money which was handed over to the execution creditor (which money, so long as it remained in the sheriff's hands, was the property of the trustee) shall become the property of the creditor? or only that the sheriff shall be protected in paying it to him, and that it shall remain subject to the claim of the trustee, so that, in case a petition in bankruptcy should be presented within twelve months, the creditor must hand it over to him? In my opinion, if the Legislature had meant by that section to make that valid which by a previous section they had declared to be void, they would have said so in clearer terms. Reference has been made in the argument to the 73rd section of the *Bankruptcy Act*, 1861; that was certainly an easier section to construe than the section in the late Act. It enacts that the sheriff "shall, at the end of seven days after the sale, pay over the proceeds, or so much as ought to be paid to the execution creditor, who shall be entitled thereto notwithstanding such act of bankruptcy, unless the debtor be adjudged a bankrupt within fourteen days from the day of the sale." Those words are plain enough; but there are no similar words in the 87th section of the late Act, and the Court is left to infer what was the intention of the Legislature. It was contended on one side that the Legislature did not intend to alter the law as to the effect of the

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payment to the creditor; on the other side it was contended that the Legislature did mean to alter it. The mere change in the language of the section would not be conclusive to my mind that the Legislature intended to alter the law in this respect; for there are other instances in the Act where the language has been varied without any change being made in the law. But in the present instance I think it would require some express words to make that valid which a previous section had declared to be invalid. If the Legislature meant that the execution creditor should be entitled to keep the money after the expiration of the fourteen days, they would have said that after that time the seizure and sale should cease to be an act of bankruptcy. But it remained an act of bankruptcy, and as such it would invalidate all subsequent dealings with the bankrupt's property if a petition for adjudication was presented within twelve months; and if all subsequent transactions are rendered invalid by it, it would seem inconsistent and unreasonable that the transaction itself which is an act of bankruptcy should not be invalid. It is true that under the 73rd section of the Act of 1861 the payment to the execution creditor was made valid, but that does not appear to me a very reasonable enactment. It seems much more reasonable that the whole transaction should be void as regards the execution creditor. I think, therefore, that in this case the Appellant, although he has a right to the goods purchased, is not entitled to keep the proceeds of the sale. He must, however, be allowed what he paid for the expenses of the sheriff. The order of the Registrar will therefore be varied, and it must be declared that the Appellant should pay to the trustee the sum of £605 3*s*. There will be no costs of the appeal.

L. C. and L. JJ.

April 15. The case was re-argued before the full Court at the request of both parties, in lieu of an appeal to the House of Lords.

Mr. *Little*, Q.C., and Mr. *Robson*, for the Appellant:—

The whole case really turns upon the question whether an execution levied by seizure and sale, which is made an act of bank-

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ruptcy by the 5th sub-section of the 6th section of the *Bankruptcy Act*, 1869, is for that reason altogether a void act against the trustee. We contend that it is not.

Under the *Bankruptcy Act*, 1861, the seizure by the sheriff was made an act of bankruptcy; therefore it was necessary to insert special words to give validity as against the assignees in bankruptcy to the subsequent sale and payment of the proceeds by the sheriff to the execution creditor, and this was done by the 73rd section of that Act in cases where there was no adjudication of bankruptcy within fourteen days. But by the Act of 1869, sect. 6, sub-sect. 5, the act of bankruptcy is not completed till the sale. The execution creditor who has effected a seizure has a security on the goods which cannot be taken away without express words. The title of the trustee does not commence till the act of bankruptcy is "completed" (sect. 11), and the act of bankruptcy is not completed till the goods are delivered and the money paid to the sheriff. As soon as that is done the debt is gone; the relation of debtor and creditor is destroyed, and the proceeds of the sale are held by the sheriff in trust for the execution creditor, who can recover them in an action for money had and received: *Swain* v. *Morland* (1); *Morland* v. *Pellatt* (2); *Higgins* v. *McAdam* (3).

There is no reason why an act of bankruptcy should be in all cases in itself void. It is nowhere made so by Act of Parliament. It is true that acts of the debtor himself, such as an assignment of all his goods, and payments by way of fraudulent preference, are void, because they are voluntary acts to defeat the other creditors; but an execution is not an act of the debtor, but an act of the creditor *in invitum*, which he has a perfect right to do. Therefore the proceedings under it are valid, except so far as they are made void by express words. It is clear that for some purposes an execution levied by seizure and sale is not void, for it is admitted that the sheriff can give a good title to the purchaser of the goods, even though he has notice of a petition in bankruptcy. The 95th section of the Act expressly gives protection to *bonâ fide* exe-

(1) 1 Brod. & B. 370. (2) 8 B. & C. 722.
(3) 3 Y. & J. 1, 13.

cutions, "subject and without prejudice to the provisions of this Act relating to the proceeds of the sale and seizure of goods of a trader;" that is, the provision respecting the retention of the proceeds for fourteen days; but beyond that period there is nothing in any part of the Act to interfere with the execution creditor's right: *Ex parte Rocke* (1).

Mr. *De Gex*, Q.C., and Mr. *Romer*, for the trustee:—

If the title of the execution creditor in this case is upheld, it will be the first case in which it has been held that a title can be made through an act of bankruptcy. It has always been taken for granted that acts of bankruptcy are void in themselves. The doctrine rests on no positive enactment, but upon the policy of the bankrupt laws. No distinction has ever been drawn between acts of the bankrupt himself and those of creditors against him, and there is no difference in principle between them. An assignment by a debtor of all his estate is not illegal or fraudulent in itself, and it would not be void unless it were an act of bankruptcy, and the same may be said of what is called a fraudulent preference of a creditor; it is only the fact that these acts are made acts of bankruptcy that makes them void. It all depends on the policy of the bankrupt law, which is, that where a man is in such a condition that he cannot pay all his creditors in full, one creditor ought not to be paid in full and the others get nothing. The same applies equally to an execution, although it is levied *in invitum*: *Belcher* v. *Magnay* (2); *Ex parte Pearson* (3). The opinion of Baron *Martin*, in *Slater* v. *Pinder* (4), is distinctly in our favour. The fact of the omission in sect. 87 of the words "who shall be entitled thereto, notwithstanding such act of bankruptcy," are conclusive as to the intention of the Legislature. The 95th section has no application to executions which are in themselves acts of bankruptcy: *Ex parte Key* (5).

Mr. *Little*, in reply.

(1) Law Rep. 6 Ch. 795.
(2) 12 M. & W. 102.
(3) Law Rep. 8 Ch. 667.
(4) Ibid. 6 Ex. 237.
(5) Law Rep. 10 Eq. 432.

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May 8. LORD CAIRNS, L.C.:—

The facts in this case are very simple, and may be stated without detail; but the question raised is one of great general importance under the *Bankruptcy Act* of 1869.

The bankrupt is a trader. The Appellant, on the 30th of June, 1873, recovered judgment against him for a debt exceeding £600, and on the same day a *fi. fa.* issued, and the sheriff seized under the judgment. The goods seized were assigned to the Appellant, the execution creditor, who paid the sheriff the purchase-money, and the sheriff, after deducting rent and poundage, paid back to the Appellant the sum for which the levy was made. All this took place more than fourteen days before the petition in bankruptcy was presented on the 1st of August, 1873. There is no attempt now made to impeach the regularity or good faith of the assignment to the execution creditor, and the case is practically the same as if the goods seized had been sold to a stranger, and the execution creditor had been paid his debt out of the proceeds.

The question is, under the circumstances I have stated, Can the execution creditor retain the amount which has been paid to him, and is the trustee in bankruptcy entitled to recover either that amount or the goods seized?

The 6th section of the *Bankruptcy Act*, 1869, provides that one of the acts or defaults which shall be deemed to be an act of bankruptcy shall be when an execution issued "against the debtor on any legal process for the purpose of obtaining payment of not less than £50, has in the case of a trader been levied by seizure and sale of his goods;" and the 11th section provides, "that the bankruptcy of a debtor shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being completed on which the order is made adjudging him to be bankrupt."

It is necessary to consider whether these sections making the suffering of a levy by seizure and sale an act of bankruptcy avoid or make inoperative the seizure and sale itself, and in my opinion they do not. It is true that under this, as under previous statutes of bankruptcy, two acts are specified, which if done by the bank-

rupt are not only acts of bankruptcy, but are also, if followed by bankruptcy, void. One is a conveyance or assignment of the bankrupt's property for the benefit of creditors, and the other is a conveyance or assignment fraudulent, or by way of fraudulent preference. It is to be observed that as to one of these acts, namely, a conveyance or assignment by way of fraudulent preference, special provisions have always been made in bankruptcy legislation, making such a conveyance or assignment void by express enactment, and reducing it accordingly; and as to the other, namely, a conveyance in trust for all creditors, it has been held from the earliest times of bankruptcy law that as the effect of such a conveyance must be to delay or defeat creditors, the law will presume an intention to delay or defeat creditors, and the conveyance would therefore be invalid as against, and perhaps even without reference to, the policy of the bankruptcy laws; while as regards both these acts it is to be observed that they are the voluntary acts of the bankrupt, and on the same principle that they were originally styled "acts" of bankruptcy, may fairly be avoided and reduced, so as to bring back into the general estate the property affected by them. An execution, on the other hand, levied against the goods of a trader by his creditors, is the act not of the trader but of the creditor, and the creditor on his part is doing nothing which is censurable, either morally or legally. He is simply using the process of law which he is entitled to use, and nothing short of express words would, in my opinion, be adequate to cut down or deprive him of the effect of an execution which, *ex concessis*, he was entitled as of right to put in force. But there is another consideration, which, as it seems to me, makes a marked difference between the case of a general or fraudulent conveyance by a bankrupt, and the case of an execution levied adversely upon his goods. In the case of a general conveyance or assignment which defeats or delays creditors, the conveyance or assignment must either be wholly set aside or must remain entirely effective; there is no *via media*. Bankruptcy, if the conveyance is not set aside, would have nothing to operate upon, and would be a mockery. So also in the case of a fraudulent preference, if the fraudulent preference is not avoided it remains valid, and the

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property is absolutely withdrawn. There is no qualified or conditional mode or measure of redress pointed out. But in the case of a seizure and sale it is altogether different. The Act of 1869 has expressly provided by the 87th section that in the case of such a sale the sheriff is to hold the proceeds of sale in his hands for fourteen days, and if he has notice during that time of a bankruptcy petition presented against the trader he is to hold the proceeds, after deducting expenses for the trustee in bankruptcy, and it is only in cases where during these fourteen days he has no such notice, that he may at the end of the time hand over the proceeds to the execution creditor, which is, in fact, what was done in this case.

This appears to me to be the very clear and sufficient machinery given by the Act itself, for the purpose not of rendering invalid the execution, or seizure or sale, but of giving to creditors of a trader a limited and qualified right to arrest the proceeds of sale, if they choose to do so with diligence. The convenience of such an arrangement is obvious, and if it had been intended by the Legislature, in making seizure and sale of the goods of a trader an act of bankruptcy, to make the seizure and sale always and *ipso facto* invalid, as against a bankruptcy supervening, it would, in my opinion, have been much better, and much more natural, and it would certainly have been much more simple, to have enacted at once that there should be no process by seizure and sale against the goods of a trader in any case whatever.

The conclusion which I draw from the sections of the Act to which I have referred is fortified by the other provisions of the Act. I cannot find in the 15th and 17th sections any words which would vest in the trustee either the property itself, the completed sale of which to a third party is made the commencement of the bankruptcy, or the proceeds of the sale, which never belonged to the bankrupt. The 95th section also appears to me to assume that the seizure and sale of the goods of a trader had not been made invalid by the earlier portion of the statute, but that certain qualified provisions only had been made with regard to the proceeds of sale. On the whole I am of opinion that the trustee in bankruptcy has in this case no right to recover either the goods or the

proceeds, and that the summons before the Registrar ought to have been dismissed with costs.

SIR W. M. JAMES, L.J.:—

I entirely concur in the conclusion to which the Lord Chancellor has arrived. It appears to me that if the case had rested solely on the language of the 5th sub-section of the 6th section of the *Bankruptcy Act*, 1869, by which an execution for a sum exceeding £50 levied by seizure and sale is made an act of bankruptcy, it would have been the duty of the Court if possible to construe the words of that enactment so as not to render invalid the act of the sheriff, done in strict obedience to the law, or the title of the purchaser derived from the law. And I think that the Court can so construe those words as not to render the act of the sheriff or the title of a purchaser, which is derived from a sale made by him, invalid, by calling in aid the language of the 11th section, which enacts that the bankruptcy of a debtor shall be deemed to have relation back to, and to commence at the time of the act of bankruptcy, or the first of the acts of bankruptcy, "being completed," and treating the completed sale as the act of bankruptcy, at the time of which the bankruptcy is to be deemed to commence. If the act of bankruptcy is the act of the bankrupt himself, then the title of the trustee relates back to the moment of the commencement of the act done by him; but if, as in the present case, it is not a voluntary act of the bankrupt, but a proceeding *in invitum*, it relates back only to the moment after the completion of the transaction which constitutes the act of bankruptcy.

But it is not necessary to rely upon that view, because it is expressly provided in a subsequent section of the Act (the 95th) that an execution executed in good faith shall not be void, that is, the act of seizure and sale is good in itself, but "without prejudice to the provisions of the Act relating to the proceeds of the sale and seizure of goods of a trader." Therefore the ordinary legal consequences after execution must follow, and the proceeds must be handed over to the execution creditor, except so far as the Act has interfered with those legal consequences. They are interfered with by the 87th section, which enacts that the sheriff shall retain the proceeds for fourteen days to enable the general creditors to serve

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him with notice of a bankruptcy petition. During that period only the rights of the execution creditor are interfered with, and I am of opinion that that provision is the limit of the right of the general creditors in this case.

SIR G. MELLISH, L.J.:—

I am glad that my first impression of the law in this case has been corrected. No doubt the foundation of my opinion was that I treated the Legislature as having made the act of bankruptcy itself void, unless there was something in the Act to the contrary. I considered that I could not decide otherwise consistently with Baron *Martin's* opinion as to the effect of the 87th section, in *Slater* v. *Pinder* (1); and it did not occur to me to question the rule laid down by that eminent Judge, which had, as I believed, been received with satisfaction by the profession. As, however, a more careful consideration of the Act has satisfied the other members of the Court that the fact of an execution being made an act of bankruptcy does not necessarily make it void, it follows that the execution creditor is entitled in this case to have the benefit of his execution.

Solicitors: Mr. *G. L. Norman;* Messrs. *E. I. Sydney & Son.*

(1) Law Rep. 6 Ex. 237.

CABALLERO *v.* HENTY.

L. JJ.
1874
March 11.

[1872 C. 107.]

Vendor and Purchaser—Specific Performance—Tenancy—Inquiry.

The conditions of sale of a public-house stated that it was in the occupation of a tenant. A brewer, intending to use the public-house for the sale of his beer, agreed to buy it. He afterwards learnt that it was under lease to another brewer for a term of which eight years were unexpired :—

Held (affirming the decree of the Master of the Rolls), that the purchaser was not bound to ascertain from the tenant the terms of his tenancy; and that in such a case the vendor could not enforce specific performance.

James v. *Lichfield* (1) observed upon.

THE Plaintiff in this case, on the 30th of October, 1871, put up for sale by auction at *Arundel* certain property, Lot 6 of which was in the particulars described as "All that capital freehold full-licensed public-house known as *The General Abercrombie*, situate in *Queen Street, Arundel*, aforesaid, as the same is now in the occupation of Mr. *T. W. Slatter* at the low rental of £20 per annum, together with the two cottages at the back, each let at 2*s.* per week, as the same are now in the occupations of *Burnand* and *Stillwell*;" and in the conditions of sale it was stated that "the properties are sold subject to the several tenancies now existing."

The Defendants were brewers at *Chichester*, and inferring (as they stated) that the tenancy of *Slatter* was from year to year, and wishing to buy the public-house for the purpose of extending their business, they directed one *Peat* to attend at the sale as their agent and buy it for them. The public-house was, however, in fact, under lease to an *Arundel* brewer for twenty-one years from 1859. It appeared that at the auction the lease was, at the suggestion of some one, read out by the auctioneer; but there was much noise and confusion in the room, and the Defendants' agent asserted that he did not hear the lease read. The auction proceeded, and the Defendants' agent was declared the purchaser of Lot 6 for £600. He paid the deposit, and signed an agreement

(1) Law Rep. 9 Eq. 51.

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for the purchase, which agreement contained no reference to the lease. An abstract of title was delivered, and the purchasers' solicitors made several requisitions, one of which was:—

"The fifth condition states the properties are sold 'subject to the tenancy now existing;' the tenancy now existing, if any, should be shewn, and counterpart of any agreement (if any such exists) produced. An abstract of such document, moreover, should be furnished to complete the abstract."

Answer.

"There has been a lease granted, which will expire in about nine years. Madame *Caballero's* former solicitor, who prepared the lease, is dead; search has been made for the counterpart amongst his deeds, but it cannot be found. Mr. *Constable,* the brewer, has the lease."

In reply to this, on the 23rd of November, 1871, the purchasers' solicitors urged a search for the counterpart lease, a copy of which was, after other correspondence, sent on the 20th of December. Further correspondence took place as to other objections to the title; and the purchasers' solicitors then laid the papers before a conveyancing counsel. On the 19th of January they wrote requiring the lease (if valid) to be surrendered. The vendor's solicitors answered that the lease was valid, and refused to obtain a surrender. After more correspondence the bill in this suit was filed by the vendor, praying specific performance.

The Master of the Rolls, Sir *G. Jessel,* dismissed the bill with costs, and the Plaintiff appealed.

Mr. *Roxburgh,* Q.C., and Mr. *W. A. Clark,* for the Plaintiff, contended that the purchasers' agent heard the lease read, and that their solicitors knew all about it. Moreover the particulars shewed that there was a lease, and then the purchasers were bound to inquire of the tenant: *Daniels* v. *Davison* (1); *James* v. *Lichfield* (2); *Bailey* v. *Richardson* (3). The property was stated to be in the possession of a tenant, and that is notice of a lease: *Taylor* v. *Stibbert* (4).

(1) 16 Ves. 249.
(2) Law Rep. 9 Eq. 51.
(3) 9 Hare, 734.
(4) 2 Ves. 437.

[The LORD JUSTICE JAMES referred to *Sugden's* Vendors and Purchasers as to notice of a tenancy affecting a purchaser (1).]

Moreover, after the purchasers were aware that the lease was for this term of years, they did not object on that ground, and continued for nearly two months to negotiate.

Mr. *Waller*, Q.C., and Mr. *Stallard*, for the Defendants, were not called upon.

SIR W. M. JAMES, L.J. :—

The judgment of the Master of the Rolls is, in my opinion, perfectly right, and it appears to me that this case is perfectly clear. [His Lordship then stated the facts of the case :—]

The Defendants are brewers, and they authorized their agent to go to the sale and bid for this property, which they intended to buy, no doubt, in the ordinary way in which brewers buy public-houses, for the purpose of supplying it with beer.

Their agent was not authorized to buy a public-house with a lease for eight years to another brewer; in fact, it was the last thing he would have been authorized to do. He says that he did not hear the lease read; but even if we assume that he did hear it, and then signed the agreement, still, in the signed agreement there is no reference to the lease. In that state of things, it appears to me that the Defendants are not bound to take this property, which was subject to a lease to another brewer for eight years, at £20 a year.

There is no pretence for the case made by the Plaintiff, that a person who wants to buy such property, and has notice of the occupation of a tenant, is bound to go and inquire of the tenant what is the nature of his tenancy. For this proposition *James* v. *Lichfield* (2) was cited as an authority. In that case there certainly are some *dicta* which nearly go to that extent, and which support the notion that the doctrine of *Daniels* v. *Davison* (3) applies as between vendor and purchaser, and whilst the matter still rests in contract. It is not necessary now to deal with that case, but I am not at present prepared to assent to any such pro-

(1) 7th Ed. p. 745; 14th Ed. p. 774. (2) Law Rep. 9 Eq. 51.
(3) 16 Ves. 249.

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position. The doctrine in question seems to me to refer to equities between the purchaser and the tenant when the legal estate has passed, and to have nothing to do with the rights and liabilities of vendors and purchasers between themselves. If there is anything in the nature of the tenancies which affects the property sold, the vendor is bound to tell the purchaser, and to let him know what it is which is being sold; and the vendor cannot afterwards say to the purchaser, "If you had gone to the tenant and inquired, you would have found out all about it."

During the argument I referred to a passage in *Sugden's* Vendors and Purchasers (1), which seems to shew that a purchaser is not bound to go to the tenant to inquire.

At all events, the vendor cannot enforce such an agreement as this.

His Lordship then stated the facts as to the alleged waiver by the Defendants, and came to the conclusion that the Plaintiff could not enforce an agreement in which he had so completely misdescribed the property; and that the Master of the Rolls was right in dismissing the bill with costs.

SIR G. MELLISH, L.J., was of the same opinion. His Lordship thought that the misdescription was such that the vendor could not have enforced the agreement; nor had the purchasers, by their conduct, adopted the agreement subject to the alteration. The appeal must be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Routh & Stacey.*
Solicitors for the Defendants: Messrs. *Holmes & Son.*

(1) 7th Ed. p. 745; 14th Ed. p. 774.

WILTS AND BERKS CANAL NAVIGATION COMPANY *v.* SWINDON WATERWORKS COMPANY.

L. JJ.
1874
March 10.

[1871 W. 1.]

Riparian Proprietors—Canal Company—Use of Water—Damage—Selling Water.

A canal company, having under their Act power to supply their canal with water from the neighbouring streams, bought a mill and turned the mill stream into the canal. Many years afterwards a waterworks company diverted part of the mill stream, and thereby supplied with water a neighbouring town:—

Held, that the canal company, both under their Act and as owners of the mill, were riparian proprietors, and had power to prevent the unlawful use of the water by other riparian proprietors, and that the supply of a neighbouring town was such an unlawful use:

Held, that as the Defendants claimed a right so to use the water, the Plaintiffs were not (in order to support their bill) obliged to prove actual damage to the canal:

Held, that the canal company had not a right to require more water than they wanted for the purposes of the canal.

Semble, nevertheless, that the canal company might sell any surplus water which remained after they had used it for the purposes of the canal.

Decree of *Malins*, V.C., reversed.

BY an Act 35 Geo. 3, c. lii., the *Company of Proprietors of the North Wilts Canal Navigation* were empowered to make and keep navigable a canal from the *Thames*, near *Abingdon*, to the *Kennet and Avon Canal* near *Trowbridge*, and also certain cuts or branches to the canal, and to supply the said canal and cuts or branches respectively, whilst the same should be making, and at all times for ever after the same should be made, with water, from all such springs as should be found in making the same, and from all rivers, springs, brooks, streams, and watercourses whatsoever, which were or should be found within the distance of 2000 yards from any part of the said canal or cuts respectively, or from any reservoir or reservoirs belonging thereto, to be made as therein mentioned, and for that purpose to cleanse, scour, deepen, enlarge, or straighten any such rivers, brooks, streams, or watercourses, or any others which might come or be brought into the same

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respectively, and to make one or more reservoirs for the purpose of supplying the said canal and cuts, or any part thereof, with water.

These powers were continued by other Acts, and by an Act 1 & 2 Geo. 4, c. xcvii., the *North Wilts Canal Company* and other canal companies were united by the name of the *Company of Proprietors of the Wilts and Berks Canal Navigation*, and that company was empowered to maintain the canal and to supply it with water, the words used being nearly the same as those in the old Act.

The canal was made, and from the year 1807 down to the year 1870 one of the chief sources of supply of water to the summit level was a stream called the *Wroughton Stream*. In the year 1807 the *Canal Company* bought a mill on the *Wroughton Stream*, called *Wayte's Mill*, for the purpose of obtaining the right of water, and they then diverted the stream, and though the mill was no longer used as such, the *Canal Company* claimed rights as millowners.

In the year 1866 a company was formed called the *Swindon Waterworks Company*, for supplying with water the town of *Swindon*, having a population of 7000 or 8000, brought there of late years by the establishment of the *Great Western Railway Company's* works, and being very badly supplied with water. In fact the *Canal Company* had for several years before 1867 sold the water of the canal to the railway company, for the use of the town.

The *Waterworks Company*, in 1867, bought a mill called *Bedford's*, the wheel of which was turned by one of the principal springs which flowed into the *Wroughton Stream*. The company pulled down the mill and constructed on the site a reservoir, the effect of which was to divert into this reservoir, and out of the canal, many of the streams which used to flow into the *Wroughton Stream* and thence into the canal.

During the severe drought of 1870 the canal was so insufficiently supplied with water that the traffic was for seven weeks stopped. The *Canal Company* complained, and the *Waterworks Company* then occasionally (as the *Canal Company* alleged) allowed the water to flow into the canal; but since November, 1873, they had, as the *Canal Company* alleged, entirely cut off the flow.

The *Canal Company*, on the 4th of January, 1871, filed the bill

in this suit to restrain the *Waterworks Company* from diverting the springs in question from the *Wroughton Stream*.

The Defendants denied many parts of the case made by the Plaintiffs, the conclusions on the evidence appearing from the judgments of their Lordships. They admitted that they intended to continue the diversion of the springs for their own purposes and profits whenever the demand on them for water required it, though they denied that the diversion caused any loss to the *Canal Company*. They denied that since the 10th of February, 1871, they had, except on Sundays, diverted any water from the springs into their reservoir, but submitted that they were entitled to do so.

It appeared that the railway had carried off nearly all the traffic from the canal, and that in 1868 the company were considering whether the canal could not be closed and the assets realised and divided. There was, however, still some traffic on the canal.

The Vice-Chancellor *Malins* dismissed the bill with costs (1), and the Plaintiffs appealed.

(1) 1873. Dec. 3.

SIR R. MALINS, V.C., after stating the facts of the case, said that

The litigation raised a question of the utmost public importance, because if the Plaintiffs were right, it followed that this *Canal Company*, and every other canal company with similar powers—and most of the canal companies had such powers—had a right to interfere with the use of water to such an extent, that no waterworks for the supply of the inhabitants of a district, or for any other useful purpose, could be established in the neighbourhood of a canal like this without the permission of the *Canal Company*. This, however, depended upon the powers given by the Acts of Parliament. One question was whether those Acts gave the company the rights of riparian proprietors. His Honour entirely agreed with the doctrines laid down in *Bealey* v. *Shaw* (6 East, 208); *Mason* v. *Hill* (5 B. & Ad. 1); *Wright* v. *Howard* (1 S. & S. 190); *Miner* v. *Gilmour* (12 Moo. P. C. 131); *Nuttall* v. *Bracewell* (Law Rep. 2 Ex. 1); and if he had come to the conclusion that the *Canal Company* were riparian proprietors, he should probably upon the evidence have held that the waterworks company were not making an ordinary use of the water, and must be restrained.

[His Honour then proceeded:—]

But what was the intention, and what must I assume to have been the intention, of the Legislature in giving these powers? They must, in 1795, have been well aware that the population of this country was then (as it has been ever since) increasing, and that new towns would be established, and new districts arise, and new wants would have to be supplied, and among those wants one of the most important would be a supply of water. If a riparian proprietor may take water from the channel flowing through his land for the purpose of his cattle, surely he must be able to take it for his own use,

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Mr. *J. Pearson*, Q.C., and Mr. *Roupell*, for the Plaintiffs:—

It may be true that our canal is not very prosperous, but that is no reason why we should be deprived of our rights. We admit

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or for the use of his family, and so forth. Must it not be understood that inasmuch as all the streams in this district within 2000 yards were to be used, that among the wants that were to be supplied would be the necessity of supplying water to human beings massed together in large numbers? Therefore I do not read this power to supply the canal with water as giving the same powers which a riparian proprietor would have. My opinion is, that this *Canal Company* has not such great powers as a riparian proprietor, but can only take such water as they can find after it has been applied to all the purposes for which mankind in the neighbourhood may require it. I do not mean that any one is at liberty to divert the stream altogether. For instance, in this very case, if the Defendants had gone to the very springs in question, and had made a channel drawing the water away to another river, that would have been an improper use of the water. That would not be the ordinary use of the water; but to take water in that district to supply human beings living in that district, seems to me a proper use—as proper as any to which it could be supplied, and one which I must assume the Legislature would have authorized, and did not intend to interfere with by giving these powers to the *Canal Company*. Therefore, in my opinion, the right given by the original Act of Parliament is not an absolute right to take all the water; and the Legislature could not have intended that after this Act was passed no proprietor of a spring in the neighbourhood could use his spring without the permission of this *Canal Company*, and that the *Canal Company* could say that, although they might not want the water at one time, they might want it hereafter.

This is a claim of a monstrous description, and a claim which I am very sorry this company ever set up, and which the facts shew they set up without any justification; and they have carried on this litigation with as little justification as they had in setting up the original claim. They had fallen into decay, and the necessity for the maintenance of this canal no longer existed. It is, therefore, greatly to be deplored that those having the management of the affairs of this company did not pause before they brought a case into Court with regard to such a broken-down business as this is, and asked me to deprive a large district of wholesome water in order that this canal may be supplied with that as to which it is of very little importance to the public or to themselves whether it is supplied or not.

If there is any doubt upon the construction of these Acts of Parliament, what conclusion ought any Court or person to come to? Here are springs affording clear water, which can be turned to the use of human beings, keeping them in health and vigour, and turned to that use by this water company, for a laudable purpose, which all mankind approve; while this *Canal Company*, to whom it can be of little use, are to prevent the water being supplied for this purpose in order that this *Canal Company* may be able to carry on a navigation which does not exist, except in the fancies of those who act on behalf of the company. On

that we only felt the inconvenience in 1870, but the Defendants claim a right to take this water, and, if they can do so, other persons may take other streams, and the canal will be left without

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broad principles, my opinion is that it never was the intention of the Legislature to confer on this company greater powers than a riparian proprietor has. My opinion is, that they have not even the powers of a riparian proprietor, but that it was only intended to give them the power of taking such water as they could find within the prescribed limits which was not wanted for the other purposes to which water can be applied."

[His Honour then commented on a question depending on the construction of the Acts of Parliament which it is not necessary for the purposes of this report to notice. He then observed that there had been no deficiency of water until 1870, and continued:—]

Under those circumstances, was it justifiable in them, without waiting for further experience, to file this bill? Would it not have been well to have paused before entering on such a litigation, in order that they might see what the result of the next spring or summer would be? They saw that the waterworks were established, not only for the benefit of the inhabitants of *New* and *Old Swindon*, but for the benefit of the *Great Western Company*. I take for granted that it is perfectly well known that one of the greatest stations on the *Great Western Railway* is *Swindon*, and that the inhabitants of *Swindon* are principally servants of the *Great Western Company*, and if they wanted the water, they wanted it for a lawful and proper purpose, and one of the greatest public importance. If it was for the railway, it was that they might continue the traffic for the benefit of the public, and if it was for the use of the workmen, it was that the traffic might be continued also. Therefore it is immaterial whether the *Great Western Company* or the inhabitants of *Swindon* disconnected with the railway wanted the water. The water was wanted, and it was only because it was wanted that it was taken. There is no suggestion in the evidence that this was a wanton taking of the water for the purpose of wasting it, but it was taken because it was wanted for the greatest of all purposes — the maintenance of human beings in a state of sound health and condition. When the *Canal Company* saw that the water was wanted for such a purpose as that, and that, if they had it, it could only be of very little use to them, ought they not to have paused before entering into a litigation such as this? They might have paused, even if they had been in a flourishing condition; but it seems to me rather a wanton waste of the funds which they have, to enter upon such a litigation, which litigation they ought to have refrained from. There is not one particle of evidence to shew that there was any deficiency of water before 1870—and this bill was filed in 1871—nor has there been any deficiency of water since 1870.

[His Honour then commented on the evidence, and said that in his opinion the quantity of water taken was absolutely insignificant, and made no appreciable difference to the navigation of the canal. So far from having been in want of water, they were in the habit of selling water to the railway company. The only case cited which had any semblance to the present case was *Medway Company* v. *Earl of Romney* (9 C. B.

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water. There is no occasion for us to prove specific damage: *Bonomi* v. *Backhouse* (1); *Wood* v. *Waud* (2). As to the necessities of the inhabitants of *Swindon*, let them buy our rights, or go to Parliament for powers if we are unreasonable.

Mr. *Glasse*, Q.C., and Mr. *Bristowe*, Q.C., for the Defendants:—

We have bought a mill and its rights, and we can take the water. We have done nothing which we were not entitled to do, and we have done no real injury to the Plaintiffs. The sole reason of this suit is, that in consequence of the exorbitant demands of the *Canal Company*, the *Waterworks Company* was formed, and the *Canal Company* cannot sell the water which they had never any right to sell. We are not now interfering with or injuring the canal. The *Canal Company* are not riparian proprietors, and have only power to use the water for the purposes of their canal, and how can that be interfered with by the rightful acts of other riparian proprietors? The Plaintiffs ought not to have allowed us to make our waterworks if they thought them injurious: *Rochdale Canal Company* v. *King* (3).

Mr. *Pearson*, in reply.

SIR W. M. JAMES, L.J.:—

I am of opinion that the Plaintiffs ought to succeed on the question of legal right which is asserted by this bill.

The Plaintiffs, many years ago, obtained an Act of Parliament by which they were entitled to supply this canal with water from the streams within a certain distance of their canal; among which

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(N.S.) 575, but that did not apply, because in this case the water was not vested in the *Canal Company*.

His Honour was, therefore, of opinion that the *Canal Company* had not the right which they claimed; that even if they had it, the abstraction by the Defendants was not of such an amount as would justify the complaint; that, except in 1870, there had been no deficiency, and that the Plaintiffs had no right to speculate on what might happen hereafter; that the *Canal Company* had only a right to water for their canal, and could not otherwise interfere with any riparian proprietor, or with the proper and beneficial use of water in the district; and the bill must be dismissed with costs.

(1) E. B. & E. 622.

(2) 3 Ex. 748.

(3) 2 Sim. (N.S.) 78.

streams was the *Wroughton Stream*. They, about the beginning of this century, availed themselves of their powers in respect of the *Wroughton Stream*, and in order to get the water from that stream they acquired by purchase a mill a little distance from the line of the canal, and they made, as they lawfully might, a new channel to divert the water into their canal near the middle of the summit level. They had acquired all the rights of a riparian proprietor with regard to that channel; and they also acquired all the rights of a riparian proprietor, which up to the time of the purchase were vested in the then owner of that mill.

Now, it is the right of a riparian proprietor in this country to prevent any other riparian proprietor above him from diverting the stream so as to cause that stream to flow otherwise than in its accustomed channel; and he has a right to have the natural flow of water through his land and into his land, and into his artificial canal, if he has had that canal for a sufficient length of time, exactly as the flow has existed during past years. All streams, however, are *publici juris*, and all the water flowing down any stream is for the common use of mankind who live on the banks of the stream; and therefore any person living on the banks of the stream has an undoubted right to the use of the water for himself, his family, and his cattle, and for all ordinary domestic purposes, such as brewing, washing, and so on. Those are the common purposes of water in the ordinary mode of using water.

The Defendants in this case are a waterworks company who, partly from public motives and partly for private profit, have been minded to supply water to the large town of *Swindon*, where, by reason of the works of the railway, a large population has been gathered together. The Defendants wish to use and divert water for the purpose of supplying those towns. That is not a purpose for which a riparian proprietor is entitled to take the water from its natural course; and the Defendants are diverting water from the stream for a purpose which is not legal, and in a manner which is not legal. The Plaintiffs, being below the Defendants on the stream, have a right to say to the Defendants that they must not divert the water from its natural course; and this is really the question of right for the Court to decide. It has been settled that actual pecuniary damage is not necessary to give a right of action

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or suit, because it is sufficient to shew that the Defendants are interfering with that which is a right, and in a mode which may give a future legal right to interfere with the stream when it may be wanted, or may in a pecuniary point of view be useful to the riparian proprietor below. I am of opinion, notwithstanding the decision of the Vice-Chancellor, that there is a clear legal right in the *Canal Company*, whether as owners of the canal, or as owners of the stream diverted into the canal, to say to the Defendants, "You must let the water flow down in its ordinary course." If we were now trying the question in an action at Law, the jury would be directed by the Judge to find a verdict for the Plaintiffs, possibly without real damages (except so far as loss was incurred in the year 1870), but with sufficient damages to shew that there was a legal right invaded, and the Judge would hold that the Plaintiffs were justified in having that right vindicated by the Courts of this country.

Then it is said that this Court will not interfere where there is no substantial damage done. In point of fact, it appears to me that in the year 1870 there was what I consider substantial damage. It may be that, from the small amount of traffic, there may not have been many barges anxious to travel along the canal during the months of September, October, November, and December, 1870. Still, if the canal was reduced two feet or three feet below its proper level at the time when it was wanted for the purpose of navigation, it appears to me that that would be a serious damage to a canal. It is impossible to say how many barges might have wanted to go along the canal at that time.

Then it is said that the Plaintiffs might diminish that evil by dredging; but the Defendants have no right to tell the Plaintiffs how and at what time they are to dredge their canal. It was not, in my opinion, an idle complaint on the part of the *Canal Company* when, in the year 1870, they said: "You, the Defendants, are taking the water away from us so as to make our canal cease to be a canal during those months."

But the Defendants not only allege that there was no damage, but they have put most distinctly and clearly on their answer a claim of right of such a kind as to make it absolutely imperative on this

Court, as it seems to me, to determine the question of right, and to declare the right one way or the other; and, as the matter now stands, with the Bill dismissed by the Vice-Chancellor, with costs, it is an adjudication in favour of the Defendants that they have the right they claim.

It is true that one of their defences is, that there has been no injury to the Plaintiffs; but it appears to me that the Plaintiffs are entitled to have a declaration from the Court that the Defendants are not at liberty to divert the water from the *Wroughton Stream* into their reservoir for their own purposes and profits whenever the demand on them for water requires it.

The *Canal Company*, however, only want water legally as a *Canal Company* for the purposes of navigation. It is true that if they have surplus water, there would be great difficulty in saying whether or not they might sell it to other persons. That, however, is a matter as between them and the other persons who would be injured by the water being so taken; but, as far as their constitution goes, they are only entitled to take and use the water for the purposes of navigation; and the surplus must be the surplus which arises casually with regard to the water they have so taken. Therefore it would be right, in making the declaration and granting the injunction, not to grant an injunction which would enable the *Canal Company* to play the part of the dog in the manger, and prevent the *Waterworks Company* from using the water at a time when the *Canal Company* are turning it off as waste, which it seems has been usually the case. The injunction must be limited to restrain the Defendants from so diverting the water as to cause any damage or hindrance to the navigation of the canal. That is all it is necessary to do for the protection of the right to the one, not unnecessarily interfering with the objects of the other. The Plaintiffs have succeeded as to their legal right: and the Defendants being wrong, the Plaintiffs must have the costs of the suit; but there will be no costs of the appeal.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I think that the *Canal Company*, having purchased land on the banks of the stream, have the ordinary rights of riparian proprietors with respect to that stream. I

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am also of opinion that, besides the ordinary rights of a riparian proprietor, they have, under their first Act of Parliament a right to take the waters of the stream for the purpose of supplying their canal with water for navigation. I agree that they have no right to take the water of the stream for other purposes, such as for the purpose of selling it; and that, if they do so, any person lower down the stream who was prejudiced by being deprived of the water would probably have a right of action at law against them. But I think that, if they took the water into their canal really for the purposes of navigation, and then happened to have a surplus quantity of water in any particular place, it would be very difficult to say that they might not legally sell that surplus quantity. That, however, is quite immaterial for the purpose of this suit; for, although I agree they have the ordinary rights of a riparian proprietor, yet this suit is really brought in respect of their rights as canal proprietors for the purpose of supplying their canal with water.

Now the argument which has been urged upon us, and which is the real argument to be considered, is this. It is said that they are only enabled to take the water for the purposes of supplying their canal with water for navigation, and that when this suit was brought (for that is the material time) they did not want it for that purpose, and therefore they ought to have no relief; and it is said that they could not bring an action at law for the diversion of the water, unless for the time when there had been a diversion which took away water which they wanted for navigation. If that was so, and if, instead of bringing this suit, they had brought an action in January, 1871, after the diversion of the water in November, 1870, at a time when they did want it (whether to a greater or less extent it is not necessary to consider), the action might have been maintained, even if the proposition was correct, that they could not maintain the action unless there had been a diversion of the water at the time when they wanted it for the purposes of navigation.

But that proposition is, in my opinion, not correct; for, although the *Canal Company* have by Act of Parliament only a right to take the water for the purposes of navigation, yet, having taken it, and having legally made a junction between the stream and

their canal for the *bonâ fide* supplying their canal with water, in my opinion they could maintain an action against the proprietor above who illegally diverted the water, notwithstanding that, at the time, they did not actually want the water for the purposes of navigation.

The test is this: Supposing the person who had so diverted the water had done so, and had used it for twenty years, could he have claimed a right? In my opinion, he clearly could. If he had kept up the diversion for twenty years, although they never wanted the water, yet, when they came to want it at the end of twenty-one years, having allowed him to divert it, their right would be lost, just the same as the right of any other landed proprietor would be lost. For the purpose, therefore, of maintaining their right they would be entitled to bring such an action.

I quite agree that this Act of Parliament does not give them the entire stream. The proprietors above are not, by the diversion of the stream, deprived of the rights which they had; that is to say, all the rights of a riparian proprietor. If the population increases round the stream, and for ordinary purposes, such as a riparian proprietor is entitled to use the stream for, the stream is diverted, the company would have no remedy. The Act of Parliament does not give them any property in the stream, but only a right to make a junction within 2000 yards of their canal, and to take all they can properly obtain, subject to the rights of the proprietors and millers above to use the water for ordinary purposes. If the proprietors above afterwards seek to use it for purposes for which they are not entitled to use it, it appears to me that the Plaintiffs have the same right that any other proprietor along the stream would have; that is to say, they have a right to use the stream for ordinary riparian purposes—a right to use it for the purpose of supplying their canal with water; and having these important rights on the stream, they are entitled to say that they will not allow a person above to acquire rights of diversion which may deprive them of the means of exercising their own rights.

It is quite plain (indeed, I do not know that it is disputed) that the diversion of the water of a stream for the purpose of sending it in large quantities to a reservoir to supply a town is not within

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the right of a riparian proprietor. To my mind, it follows, that at the time when this suit was brought the Plaintiffs might have maintained an action at law for diversion.

Then what relief ought they to have in this Court? I quite agree in the modification which the Lord Justice has proposed; and the fact that previously to bringing this suit they have sold large quantities of water, makes it more necessary that we should see that our injunction does not enable them to get water for purposes for which they are not entitled to take it. On the same principle, if they brought an action at law for the diversion of the water, though they might maintain the action, they could not allege as special damage that they had been deprived of large quantities of water which they might otherwise have sold for profit. They could not, being only entitled to the water for navigation, have recovered damages for that which prevented them from having the water for other purposes.

MINUTES:—Declare that the Defendants are not entitled to divert into their reservoir the waters of the *Wroughton Stream*. Restrain the Defendants from diverting into their reservoir the waters of the several springs which unite and become the *Wroughton Stream*, or the waters of the said stream so as to interfere with the supply of water required by the Plaintiffs for the navigation of the canal. Defendants to pay the costs.

Solicitors for the Plaintiffs: Messrs. *T. White & Sons*, for Mr. *H. C. Crowdy, Highworth, Wilts.*

Solicitor for the Defendants: Mr. *J. Crowdy*, for Messrs. *Townsend & Ormond, Swindon.*

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[1873 L. 100.]

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Light and Air—Grant—Covenant for Quiet Enjoyment—Injunction against Breach of Covenant—Proof of Damage—Easement—Practice—Surveyor appointed by Court.

There is no difference in the right of an owner of land to the ordinary easement of light, whether it is acquired by twenty years' user or by grant from the owner of the servient tenement; and if the grant is accompanied by a covenant for quiet enjoyment of the premises, such covenant does not enlarge the right of the covenantee so as to entitle him to an injunction in equity to restrain an obstruction where the damage is not sufficient to enable him to maintain an action at law.

But it is otherwise where the right to light claimed is not the ordinary easement, but a special right created by the covenant; in which case a Court of Equity will grant an injunction without regard to the amount of damage.

Where the Court was not satisfied from the evidence whether the wall proposed to be built by the Defendant would or not be a material obstruction to the Plaintiffs' lights, the Court directed a temporary screen to be erected to the height of the proposed wall, and appointed a surveyor to report on the effect.

THIS was an appeal from a decree of the Master of the Rolls.

The Plaintiffs were *W. Leech* and *W. H. Dodwell*, cigar manufacturers and occupiers of a warehouse and premises in *St. Mary Axe*, in the City of *London*.

The land, on which the warehouse had been recently erected, was demised to *William Haynes* by the Master and Wardens of the *Skinners Company* by an indenture of lease of the 1st of February, 1866, for a term of eighty years from the 25th of March, 1865. The premises were demised "with all lights, easements, advantages, and appurtenances whatsoever thereto belonging or in anywise appertaining;" and the indenture contained a covenant by the *Skinners Company* with the lessee, his executors, administrators, and assigns, that the lessee, his executors, administrators, and such assigns as by the *Skinners Company* should be allowed, "might peaceably and quietly have, hold, use, occupy, possess, and enjoy the said premises during the said term without any let, suit, trouble, molestation, hindrance, or disturbance whatsoever of,

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from, or by the said Master and Wardens, their successors or assigns, or any person or persons claiming under or in trust for them or any of them."

On the 30th of August, 1868, *W. Haynes*, with the consent of the *Skinners Company*, demised the warehouse and premises, with the same general words, to the Plaintiffs for a term of twenty-one years from the 25th of December, 1868, at the rent of £557.

The principal rooms in the basement, ground floor, and first floor of the Plaintiffs' warehouse were lighted by a skylight in the roof of the building. There was a large opening, or well, in the floor of the first floor and ground floor rooms which admitted the light from the skylight to the rooms below.

There were also back windows to some of the rooms on the first and second floors of the building.

The building which stood on the same site before the Plaintiffs' warehouse was built, was lighted in the same way, and the light had been enjoyed uninterruptedly in that manner for more than forty years.

The Defendant, *J. E. Schweder*, had recently taken the piece of land adjoining the Plaintiffs' warehouse under an agreement for a lease from the *Skinners Company*, and had commenced to erect a building, the plans of which had been approved by the company. In so doing he raised the party-wall between his premises and those of the Plaintiffs above the height to which it had been built by the Plaintiffs, and continued it beyond the Plaintiffs' building. The Plaintiffs alleged that the Defendant by this wall obstructed the light coming to the skylight and back windows of the Plaintiffs' warehouse, and they filed the present bill to restrain him from interfering with their ancient lights. When the bill was filed the wall complained of had been raised about fifteen feet above the original height, and the Defendant proposed to raise it to the height of about fifteen feet more.

The Defendant, in his answer, denied that the new wall, which was to the north of the Plaintiffs' skylight, in any way obstructed the light coming to the Plaintiffs' skylight or back windows, and he claimed the right of erecting it as high as he pleased.

On the 5th of August, 1873, an interim injunction was granted by the Lord Chancellor (Lord *Selborne*), restraining the Defen-

dant from proceeding with his building till the hearing of the cause.

Both parties entered into evidence as to the effect of the new wall in obstructing the light coming to the skylight and back windows of the Plaintiffs' house; but the Plaintiffs failed to shew that the wall, so far as it had been already constructed, caused a material obstruction. The Master of the Rolls, however, was of opinion that it was not necessary for the Plaintiffs to prove substantial injury, and accordingly granted a perpetual injunction restraining the Defendant from erecting, or permitting to remain, any wall or other building which should molest, hinder, or disturb the Plaintiffs in the enjoyment of all those lights belonging or in any way appertaining to their warehouse (1). From this decision the Defendant appealed.

(1) 1874. Jan. 21.

SIR G. JESSEL, M.R.:—

How this case would have stood if the *Skinners Company* had not been the owners both of the Plaintiffs' warehouse and of the land on which the Defendant is about building a warehouse or offices, I have no occasion to say; but on the facts as they now appear, and having regard to the circumstances to which I shall call attention, and what I consider the settled law, I am bound to grant the Plaintiffs an injunction, limited in the way I will mention.

The Plaintiffs are underlessees, having a lease of Mr. *Haynes*, who is himself the lessee of the *Skinners Company* of a warehouse in *St. Mary Axe*. The Defendant has an agreement for a lease from the same *Skinners Company* of an adjoining piece of land, on which he is about to erect a building of considerable height and importance, and the question I have to decide is, whether the Plaintiffs are entitled by injunction to restrain the Defendant from carrying up the building to such a height as will disturb or molest them in the enjoyment of their rights in this warehouse which were granted to them by the lease to *Haynes*.

First of all I will state my view of the case, independently of the facts. In my view this case is to be tried precisely in the same way as if *Haynes* was Plaintiff and the *Skinners Company* were Defendants. My reason for that view is this: The Plaintiffs have got under *Haynes* all the rights for this purpose that *Haynes* possessed. The Defendant claims under the *Skinners Company* by agreement, and, as appears even from the plan to the agreement with the *Skinners Company*, had notice, at the time he entered into the agreement, of the tenancy of the Plaintiffs; besides which he has not pleaded want of notice. The result, therefore, is, that, having obtained the land with notice of the Plaintiffs' rights, he cannot in this Court, whether the covenant did or did not run with the land, say that he is not as fully bound as the original covenantors. Of course I allude to the doctrine laid down in *Tulk* v. *Moxhay* (2 Phil. 774) and subsequently in *Western* v. *MacDermott* (Law Rep. 2 Ch. 72). Assuming

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The *Attorney-General* (Sir *R. Baggallay*), and Mr. *Dundas Gardiner*, for the Appellant:—

As far as the actual amount of damage which has been proved

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then that we had *Haynes* as Plaintiff and the *Skinners Company* as Defendants, I find that the *Skinners Company* have by deed, namely, by this lease, granted to *Haynes* this warehouse, "together with all yards, areas, ways, paths, passages, waters, watercourses, lights, easements, advantages and appurtenances whatsoever thereto belonging or in anywise appertaining," for eighty years from the 25th of March, 1865. Now it is admitted by the Defendant that the warehouse of the Plaintiffs is exactly in the same state now as regards lights as it was at the date of this lease on the 1st of February, 1866. There can be no question, therefore, that the *Skinners Company* granted to the Plaintiffs all the lights which are now in the warehouse. In addition to that express grant there was a covenant which contained these words: that the lessee "shall and may peaceably and quietly have, hold, use, occupy, possess, and enjoy the said premises during the said term without any let, suit, trouble, molestation, hindrance, or disturbance whatsoever of, from, or by the said Master and Wardens, their successors and assigns, or any person or persons claiming under or in trust for them or any of them." The Defendant claims under them, and therefore there is an express covenant binding on the Defendant that whatever has been granted shall be enjoyed without any molestation or disturbance whatsoever. It appears to me, therefore, that the question I have to try is, whether the acts of the Defendant amount to molestation or disturbance of the rights so granted to the Plaintiffs, not forgetting that in the construction of this instrument I am bound to give it the construction most favourable to the Plaintiffs and least favourable to the Defendant, putting the Defendant in the position of grantor.

That being the position of matters, I think it is not incumbent upon me to decide whether the molestation or disturbance is of so substantial a character, or likely to become of so substantial a character, as to prevent the comfortable enjoyment of the Plaintiffs' warehouse, or the proper use of it for the purposes of their business. I think I must decide whether there is any molestation or disturbance at all; but if I come to the conclusion that there is such molestation or disturbance, then, according to the law as I consider settled by the authorities I shall refer to, I am bound to grant this injunction.

Now what are the facts? It is no use to go through the long affidavits in this case, because any one looking at the plans and reading two or three of the affidavits, with the assistance of the photographs and a foot rule—all which assistance I have enjoyed—cannot come to any other conclusion than that there is some sensible and appreciable interference with the lights of the Plaintiffs. There are two sets of lights interfered with. The first is a large skylight at the top of the room which seems to be used for the manufacture of cigars, and the others are the back windows, as to which the interference is purely lateral. As regards the skylight, the wall has at present been carried on for about fifteen feet above the skylight, that is, above the horizontal section where the skylight begins. It is attempted to be

by the Plaintiffs, we may conclude from the judgment of the Master of the Rolls that, if this had been a case of ordinary ancient lights, he did not think that such damage had been shewn

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said that the injury is not appreciable or sensible. We have a great deal of evidence on both sides, a great deal of evidence of experts, and, as is not uncommon, the experts for the Plaintiffs take one view, and the experts for the Defendant take another. But I cannot help seeing that the Defendant's experts, although occasionally using language which seems to imply that there is no interference whatever, rather confine their remarks to the substantiality of the interference in the sense of interfering with the Plaintiffs in carrying on their business. The Plaintiffs' witnesses go the whole length in the other direction, and not only assert a substantial interference with the light, but say it is so great as to interfere with the proper carrying on of the business, so as to bring it within the cases relating to nuisance. My conclusion is that there is a sensible and appreciable interference, and that it is a case of some actual damage; but, for reasons I am going to give, it is not incumbent upon me to decide as to what is the extent of that actual damage.

As regards the back windows, I consider that even the witnesses for the Defendant admit diminution of light; and, without going through the details of the evidence, it is sufficient to say that I have arrived at the conclusion that there is molestation, hindrance, and disturbance of the rights granted by the *Skinners Company*.

The next question is, what is the law of the Court on that subject? I have been pressed by the Defendants very properly (and not at all at too great a length) with considerations as regards the seriousness of the consequences to them and the public generally if I adopt the view that, without proving so great an extent of damage as would entitle the Plaintiffs to damages in an ordinary case of nuisance, an injunction ought to be granted in this case. I am not at liberty to take those considerations into account. No principle can be more sacred than that a man shall be compelled to perform his contract. In all cases where a Court of Equity has jurisdiction to enforce the specific performance of contracts, and persons voluntarily, without any fraud, accident, or mistake, enter into contracts, the jurisdiction should be exercised. Again, if it is not distinct specific performance, but that kind of relief which is given where the contract has been substantially performed, namely, by restraining a breach of some covenant in a deed of grant or lease or other document of title by which or under which the possession is changed and enjoyed—in all those cases the Court enforces, not exactly specific performance, but prevents a breach of the covenant by the party entering into the agreement in aid of the enjoyment and possession granted to the other party. That has been the course universally pursued from the earlier cases, where a farmer was prevented by injunction from taking hay or straw off the land when he covenanted merely that all the hay and straw should be used on the land, to the more recent cases, where persons have been restrained from building on the land. The Courts have uniformly adopted the principle that in all these cases an injunction will be granted, so as to make the per-

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as would justify the Court in interfering; but he distinguished the case on the ground that there was an express grant of lights, and also a covenant for quiet enjoyment. But there is no other

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son who has entered into the contract specifically perform it, and not break the covenant he has entered into. As was said in *Lumley* v. *Wagner* (1 D. M. & G. 604), the extent to which that jurisdiction has been exercised is not to be abandoned. I should be disposed to go further if I had the power, and extend the jurisdiction, in cases of specific performance, very much beyond what it has been the habit of the Court of Chancery to do.

Now how does the matter stand on the authorities as to granting injunctions in cases of covenant? It is clearly established by authority that there is sufficient to justify the Court interfering if there has been a breach of the covenant. It is not for the Court, but the Plaintiffs, to estimate the amount of damage that arises from the injury inflicted upon them. The moment the Court finds that there has been a breach of the covenant, that is an injury, and the Court has no right to measure it, and no right to refuse to the Plaintiff the specific performance of his contract, although his remedy is that which I have described. Upon that we are not without authority. *Tipping* v. *Eckersley* (2 K. & J. 270) was decided by Lord *Hatherley* when Vice-Chancellor, and what he says as to the law at page 273 is this: "It was admitted, and could scarcely be otherwise, that had the deed contained a covenant on the part of the Defendants not to pour hot water into the brook, the question of the degree of heat would have been immaterial, the question of damages would have been one not necessary to be tried, and the Court would restrain at once. The question is, whether this covenant is not identical; whether, if I demise a given portion of a given thing, and covenant for the free use and enjoyment of it in the state in which it exists at the time of the demise, I do not covenant in effect that I will not interfere or intermeddle in any way with the state of things as then existing."

A similar point came before my predecessor in the case of *Dickenson* v. *Grand Junction Canal Company* (15 Beav. 260). The observations I refer to are to be found at page 270: "If it be a contract duly entered into between the parties, it is no answer to a violation of it to say, that it will not inflict any injury upon one of the contracting parties. If the Plaintiffs have purchased from the company a right to preserve the waters in the rivers *Bulbourne* and *Gade* from being diverted in any other manner than as diverted at the passing of the Act of 58 Geo. 3, it is no answer to them to say, that the diversion proposed will not be injurious to them, or even to prove that it may be beneficial to them. It is for them to judge whether the agreement shall be preserved, so far as they are concerned, in its integrity, or whether they shall permit it to be violated."

Those judgments appear to me to be founded on sound principle. The party entitled to the benefit of the contract must be the sole judge of the extent to which he will permit it to be violated. It is the business of the Court to enforce the contract, and in such a manner as the ordinary jurisdiction of the Court enables the Court to enforce it.

There is another case on the subject,

grant here than the grant of the ordinary easement which is granted with a tenement, and the right in no way differs from that which may be acquired by twenty years' user. The covenant

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which, although not going so far in expression, is a good illustration of what has occurred in this case. I refer to *Western* v. *MacDermott* (Law Rep. 1 Eq. 499; 2 Ch. 72). That was a case of a contract or covenant not to build. I must say, on looking at the case, and without meaning to reflect on the parties, that the conduct of the Plaintiff looks rather unneighbourly. All his neighbour had done was to throw out a bow window at the back of his house eight feet beyond the wall, which to a very slight extent undoubtedly interfered with the Plaintiff's enjoyment of the breakfast-room on the same level. It was alleged that the projection of eight feet would interfere with the light of the room. In that case (Law Rep. 1 Eq. 505) the Master of the Rolls says that that would not have been sufficient to restrain the Defendant on the ground of nuisance. "This suit could not, in my opinion, have been maintained on the ground of obscuring ancient lights." . . . "I am of opinion that the next-door neighbour could not, in ordinary circumstances, complain of this as such an injury to him as he was entitled to stop; but at the same time I am of opinion, on the evidence, that notwithstanding this, the injury done to the two houses adjoining No. 9 is substantial. In the case of the Plaintiff's house, it intercepts the early rays of the sun, and it also partially obstructs the view from his window; and I have no doubt it would make his house and the house on the other side less sought after than others in the row, and lower their value in the market to an appreciable extent, though I should infer from the evidence probably not to any very considerable extent." Therefore the Master of the Rolls was of opinion that it was substantial, but small; and he granted the injunction, expressly saying that he would not have granted it had there been no contract. When it went before the Lord Chancellor *Chelmsford* on appeal, it was put to him, that on the evidence the damage was very trifling indeed, and that the Master of the Rolls was not right in saying that there was substantial damage at all; therefore he was asked to dissolve the injunction. Though he was in favour of the Appellants on the evidence that there was no substantial damage, he would not dissolve the injunction; and he says (Law Rep. 2 Ch. 75): "The Defendant, in the next place, says that, admitting the addition to his house to be a violation of the covenant, yet equity will not interfere, as the Plaintiff has not sustained, nor is likely to sustain, any actual damage thereby. Whether this ground of non-interference by equity can be applicable to a case of this peculiar description may be a matter deserving of some consideration. The object of the covenant was to prevent, for all future time, any obstruction to the view from the backs of the houses by buildings or trees above a certain height" . . . "If, then, it were necessary to wait until 'substantial injury' (to use the words of the Master of the Rolls) were sustained, that period might never arrive, although violations of the covenant might be continually occurring, and the owners of the houses would never be in a situation to invoke the interposition of this Court to prevent the breach of a covenant intended solely

105 C 12 Jur NS. 366, 35 Beav 243.

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for quiet enjoyment is only for the enjoyment of the premises comprised in the grant, and does not extend the covenantee's right to light, although it gives him an additional remedy. In such a case the Plaintiffs must shew substantial damage before they could maintain an action at law, and there is no difference in this respect between equity and law. If the lights secured by the covenant were of a special nature, the case would be different. In that case the Court might not regard the *quantum* of damage if the covenant were broken: *Ingram* v. *Morecroft* (1); *Booth* v. *Alcock* (2); *City of London Brewery Company* v. *Tennant* (3); *Kelk* v. *Pearson* (4).

for their benefit. But it is unnecessary to determine this question, because there is evidence, upon which the Court may fairly act, that actual damage will be produced by the Defendant's building diminishing the value of the Plaintiff's house." That is, diminishing it to some slight extent, although not substantially. It was not for the Lord Chancellor to say, that even if no damage were proved it would do; but it was sufficient for him to say, that if damage, although not substantial, were proved, it would certainly do.

In that state of the authorities, I think it is plain that if the Plaintiffs establish that they have a grant of all the lights of the house, and if the Defendant is interfering with or obstructing any of the lights so as to commit a breach of the contract as to quiet enjoyment, they are entitled to the aid of this Court. It was pressed upon me that such a decision would be extremely inconvenient not only to the Defendant in this case, but to persons in general who build houses in rows and grant leases to persons who purchase one or more of those houses. This Court has nothing to do with that. If persons are so careless or so oblivious of their interests that they choose to enter into contracts which are inconvenient to them, that is no reason why the Court should not, at the instance of the other party, enforce it. It may be inconvenient and injurious to the *Skinners Company* that, having granted a lease with all the lights, they are not allowed to build on their adjoining land to the extent of obstructing one of those lights, though the use of that one is not necessary, or even perhaps desirable, for the tenant of the house to which the privilege is affixed. I have nothing whatever to do with that; I must construe the contract as I find it. The result will therefore be, that I must grant an injunction restraining the Defendant from erecting or continuing any wall or other building which will molest, hinder, or disturb the enjoyment by the Plaintiffs of all the lights belonging, or in anywise appertaining, to their warehouse which belonged or appertained thereto on the 1st of February, 1866, being the lights now belonging thereto. It will be for the Defendant to determine to what extent that compels him to pull down the wall already erected. To some extent I am of opinion he must pull it down. In a case of this kind the costs must follow the result.

(1) 33 Beav. 49.
(2) Law Rep. 8 Ch. 663.
(3) Ibid. 9 Ch. 212.
(4) Ibid. 6 Ch. 809.

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Mr. *Southgate*, Q.C., and Mr. *Locock Webb*, for the Plaintiffs:—

Our case differs from the ordinary cases of obstruction of ancient lights, because the Defendant is bound by the covenant of the *Skinners Company* that nothing shall be done by them, or those claiming under them, to molest or obstruct the lessees in the enjoyment of the light as it existed when the grant was made to them: *Davies* v. *Marshall* (1). It is not, therefore, necessary for us to shew what amount of light was anciently enjoyed by the owners of the land, nor to prove any material damage: it is enough that we can shew an interference with the light as it existed at the time of the grant that is not merely trivial. The mere fact that there has been a breach of the covenant is sufficient ground for this Court to interfere: *Tipping* v. *Eckersley* (2); *Back* v. *Stacey* (3); *Attorney-General* v. *Nichol* (4); *Dickenson* v. *Grand Junction Railway Company* (5); *Watts* v. *Kelson* (6); *Piggott* v. *Stratton* (7); *Western* v. *MacDermott* (8). But if we are called upon to shew substantial damage, the evidence is sufficient to shew that, if the wall should be built to the height which the Defendant threatens to build it, the light will be very materially interfered with.

At the conclusion of the argument of the counsel for the Respondents, the Attorney-General offered to consent to build the wall so as not to exceed a height which he then indicated, and that the bill should be dismissed without costs, and no costs of the appeal.

SIR W. M. JAMES, L.J., said that the case might stand over for the Plaintiffs to decide whether they would accept the terms offered; and if they were not willing to do so, it would be necessary to have further evidence as to the effect of continuing the wall above its present height, and for that purpose the Court would direct a scaffolding or screen to be erected to the height proposed in the plans, and would appoint a surveyor to report upon

(1) 1 Dr. & Sm. 564. 7 Jur N.S. 720
(2) 2 K. & J. 264.
(3) 2 Car. & P. 465.
(4) 16 Ves. 338.
(5) 15 Beav. 260.
(6) Law Rep. 6 Ch. 166.
(7) 1 D. F. & J. 33. 6 Jur N.S. 129
(8) Law Rep. 1 Eq. 499; 2 Ch. 72. 12 Jur N.S. 366: 35 Beav 243

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the effect of it. It was necessary, however, first to give judgment upon the point of law decided by the Master of the Rolls.

SIR G. MELLISH, L.J.:—

The Master of the Rolls decided this case on a question of law which is one of very considerable importance, and as we have the misfortune to differ from him on that question of law, we think it is desirable to give judgment upon that point now. It is well known that there are two ways by which at present the right to light can ordinarily be acquired. First, it can be acquired by twenty years' user or occupation of lights under the *Prescription Act;* and secondly, it can be acquired by what is ordinarily called the disposition of the owner of the two tenements. It is perfectly established that if a man owns a house, and owns property of any other kind adjoining that house, and then either conveys the house in fee simple or demises it for a term of years to another person, a right to light unobstructed by anything to be erected on any land which at the time belonged to the grantor passes to the grantee. I am clearly of opinion, as I have before expressed in the case of *Kelk* v. *Pearson* (1), that there is no difference in the extent of these rights. It makes no difference whatever whether a person has acquired the right to light by twenty years' user, or has acquired it by the disposition of the owner of the two tenements. In either case the extent of the right is exactly the same. If the mode in which the right to light is acquired by law is considered, that will be quite clear, because before the passing of the *Prescription Act* almost all rights to light were ordinarily obtained by a grant express or implied. No doubt they might be claimed by prescription, but of course there were very few lights that could practically be claimed by prescription, because, in order to support a light by prescription, the light must have existed since the time of *Richard* I. There were very few houses, in fact, which existed from the time of *Richard* I., and the lights of all other houses were, in point of law, always considered to be claimed by a lost grant, and it was always so pleaded at law. The Courts of Law, on the consideration of the extent of such a right, had, long before the

(1) Law Rep. 6 Ch. 809.

Prescription Act, held that it did not entitle the owner to every ray of light that might happen to come through the windows, and that he could not maintain his action for the abstraction of light unless he could make out that the comfort of his house was diminished by the deprivation of light, or that he was prevented, if he was the owner of business premises, from carrying on his business in the same manner as he was accustomed to carry it on before.

That being so, in the present case the light is claimed by the disposition of the owner of two tenements. The first question we have to consider is, whether in fact any greater right than the ordinary easement is passed by the terms of the deed. Now, by the terms of the deed, the *Skinners Company* demise "all that piece or parcel of ground, with the warehouses, tenements and appurtenances therein, situate and being on the west side of *St. Mary Axe*," &c.; and then follow general words including "all lights, easements, advantages, and appurtenances thereto belonging or in anywise appertaining." Now I am very clearly of opinion that the use of the word "lights" among the general words in that lease means nothing but the ordinary right to light, namely, that well-known easement which has been known and which has existed in the law from time immemorial. I think it is unnecessary to decide the question, which may possibly admit of some doubt, whether, from the use of the words "belonging or in anywise appertaining," the right to the light in this case passes under those words, or whether it passes merely under the grant of the house. The words "belonging or appertaining" would, strictly speaking, apply to lights legally appertaining, which these lights are not. But it may be, having regard to the situation of these premises, which are described as being newly erected, a rather more extensive meaning would be put on the words "belonging or appertaining," and they might be held to include lights usually held and enjoyed. It appears to me unnecessary to decide that point, because under any circumstances it is clear that the right to light as against the lessors, in respect of any premises which at the date of this deed belonged to the lessors, passed to the lessee, and it is quite clear that no greater right passed, even assuming that the words "lights belonging and ap-

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pertaining" did include the right to the entrance of light into all the windows then existing in the house, over the premises of the vendors; because it is quite clear that the word "lights," when used in general words in a conveyance, means the ordinary right of light as it is known and limited by the law, and no greater right.

The next question is, Does the covenant for quiet enjoyment make any difference? I have no hesitation in saying that nothing can be clearer than that in a Court of Law the covenant for quiet enjoyment, in its plain ordinary terms, does not increase or enlarge the rights which were granted by the previous part of the conveyance. Of course it would be possible to insert in any covenant words which would increase the right of the covenantee to damages at law if his rights were violated, and would entitle him to an injunction in equity to enforce that right. For instance, it might be said in a covenant that the lessee should freely enjoy the house, with an uninterrupted view from his drawing-room windows over all the existing land of the lessor. If that were inserted, no doubt it would give a larger right than had previously been granted, and damages might be recovered at law if the lessor broke that covenant, and a Court of Equity would grant an injunction against the lessor if he were intending to break it, and no doubt would also grant an injunction against the person claiming under the lessor if he took with notice of the covenant. But this is not a covenant of that kind; it is simply a covenant for quiet enjoyment; and I am clearly of opinion that it does not enlarge the right in any way. It is perfectly true that the lessee is "to hold and enjoy without any suit, let, or hindrance." But what is he to hold and enjoy? "The premises." What are the premises? The things previously demised and granted. The covenant does not enlarge what is previously granted, but an additional remedy is given, namely, an action for damages if the lessee cannot get, or is deprived of that which has been previously professed to be granted. Nothing, I apprehend, can be plainer than that at law it would not, in the least degree, enlarge what was granted. This being the grant of an easement well known to the law, the benefit of it passes with the dominant tenement, and the burthen of it passes with the

servient tenement, to every person to whose occupation the dominant and servient tenements respectively come. Therefore the Plaintiffs in this case, if their lights were really disturbed, being the occupiers of the dominant tenement, could bring an action at law, not an action on the covenant, but an action on the case for the disturbance of that right or easement which was so granted, and it would not make the least difference whether the right had been created by twenty years' enjoyment, or whether the right had been created by grant, express or implied. In either case he would have the same remedy.

The question we have now to decide is, whether he has a greater right in equity than at law. I must say it rather surprises me to find that it should be supposed that he has any greater right in equity. I always supposed that where a right existed at law, and a person only came into equity because the Court of Equity had a more convenient remedy than a Court of Law, which is the case where a person has a legal right to lights, there equity followed the law, and the person entitled to the right had no greater right in equity than at law. In my opinion there is a distinction between this case and those cases referred to by the Master of the Rolls, where there was no grant at law at all, but the right had merely come into existence by covenant. Where the right comes into existence by covenant, the burthen does not run at law with the servient tenement at all; but a Court of Equity says that a person who takes it with notice that such a covenant has been made, shall be compelled to observe it. That is the ordinary case where there is such a covenant as I before referred to, that a person shall have an uninterrupted view from his drawing-room window, because the law will not allow the owner of land to attach an unusual and unknown covenant to the land, so that a man who buys the property in the market without knowing that it is subject to any such burthen, would find that some previous owner had professed to bind all subsequent owners by an obligation not to obstruct the view which somebody else would have from the windows of his house. In such a case as that, though the man who makes the covenant is liable, yet those claiming under him are not liable at law; but the Court of Equity says that if a purchaser has taken the land with notice of that contract, it is contrary to

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equity that he should take advantage of that rule of law to violate the covenant. But in the case of a grant of a well-known easement, such as a right to light or a watercourse, or a right of way, or any of the numerous easements which are well known to the law, when they are once validly created the right passes at law, and the owner and occupier of the dominant tenement may maintain an action against the occupier of the servient tenement if the right is interfered with; and in all such cases the rule in equity ought to follow the law. If the legal right is not interfered with, or if such damage has not been occasioned as would sustain an action at law, then, in my opinion, there is no right in this Court.

The only ground on which it could be supposed to make any difference would be this—that there are cases in which an action might be maintained at law, and yet there would not be damage sufficient for this Court to interfere in granting an injunction. In such a case possibly it might be contended (though I doubt whether such an opinion would be correct) that the covenant for quiet enjoyment would be a reason why this Court should grant an injunction when less damage has been occasioned than would have supported an injunction if there had been no such covenant for quiet enjoyment, and the right had been merely gained by twenty years' user. Practically, in my opinion there is no difference with respect to light in the amount of damage which would entitle a person to maintain an action at law and that which would entitle him to file a bill in equity. The circumstance that all cases of loss of light and air are brought to this Court, seems tolerably good evidence that the world at large does not consider that a Plaintiff has practically a better chance of succeeding if he has the right to light tried before a judge and jury than he has if he comes to this Court. I am most unwilling to make a difference between law and equity when I do not find it exist.

Therefore, in my opinion, in this case the Plaintiffs have the ordinary right to light, and it does not make the slightest difference whether the light was acquired by twenty years' user, or whether it has been acquired, as it has been acquired in this case, by the disposition of the owner of the two tenements. I think that nothing could be more inconvenient than that there should

be two rights, one more extensive than the other, according to the manner in which they had been acquired. Whenever the servient and dominant tenements come into the occupation of the same owner, of course the right to lights is gone, and when they are separated, it again arises by what is called the disposition of the owner of the two tenements. Whenever that takes place, whether it is a lease or an absolute conveyance, there is always, in the ordinary practice of conveyancers, a covenant for quiet enjoyment, and I cannot help thinking it would be most mischievous if it were held that a person who claims a right by an express covenant in that way under a conveyance has a greater right than a person who obtains his right to light by twenty years' user. Therefore I cannot agree with the ground upon which the Master of the Rolls has decided this case, and I am of opinion that the Plaintiffs have an ordinary right to light, and no more.

SIR W. M. JAMES, L.J. :—

I am of the same opinion. It was to me a very startling novelty to find that the case was supposed to turn upon the covenant for quiet enjoyment. The covenant for quiet enjoyment is in the ordinary form, the form which has been in use for centuries, and in countless instruments of all kinds. I certainly never understood that it was the object or effect of a covenant for quiet enjoyment to enlarge the rights of the grantee or to increase the liabilities of the grantor. The covenant was simply a covenant that the grantee should have that which had been purported to be granted to him either expressly or by implication. I quite agree with the Lord Justice in saying that the fact that there was a covenant for quiet enjoyment in this case ought to be entirely put out of the question. I quite agree, also, it would be a source of infinite litigation, mischief, and injustice, if every landlord in this country were supposed in every lease of a dwelling-house or other property to give, by the general words or by a covenant of quiet enjoyment, to the lessee or grantee any right greater than the grantee would have by the ordinary rules of law as against a third person; always, of course, excepting the distinction that twenty years is wanted in the one case and not in the other. As I understand the terms of the grant in this case, my strong

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opinion would be, if the grant is construed strictly according to its legal meaning, that the express grant of lights is the grant of lights over another man's property, that it is a grant of that which had in law an existence as an easement over another man's property at the time when the grant was made. There was the grant of the property, and there was the grant of this thing belonging to it, and which appertained to it in respect of some other person's estate. In my opinion the grant of those lights as there expressed only deals with that same thing (whichever way it is construed) which has been given by the grant of the house itself to the lessee. There is, moreover, no reason for giving more than the actual legal meaning to the words. The conveyance of the property, as between the owner and the grantee of the property itself, would give him *de facto* the enjoyment of everything which could be enjoyed in the nature of an easement against a third person. I think, further, that the right to lights means the very same thing as is expressed in the *Prescription Act* (2 & 3 Will. 4, c. 71, s. 3) by the words "access and use of light to and for every dwelling-house, workshop, or other buildings." If the words in the grant had been, "together with the access and use of light to and for the said dwelling to the existing windows," it would have had exactly the same effect as the word "lights" here, and those words, if inserted in the deed, would have the same effect as the words in the Act, and as the supposed words in the lost grant in the old cases.

I quite agree with the Lord Justice that this question is to be tried on exactly the same principles as if it were a suit against a neighbour, on the assumption that the lights were of sufficient antiquity. Therefore the question must now be put in train for further inquiry, and for further argument as to costs, in case the parties do not agree.

Solicitors for the Plaintiffs: Messrs. *Lumley & Lumley.*
Solicitors for the Defendant: Messrs. *Travers Smith & Co.*

Ex parte ANGERSTEIN. *In re* ANGERSTEIN.

L. JJ.
1874
April 17.

Bankruptcy—Practice—Trustee—Payment of Costs personally.

If a trustee in bankruptcy makes an unsuccessful application to the Court, he will, in the absence of special circumstances, be ordered to pay the costs; and if the estate is insufficient for payment of the costs, the trustee must bear them personally.

IN this case the trustee in the bankruptcy of Mr. *J. C. F. Angerstein* applied to Mr. Registrar *Pepys*, sitting as Chief Judge, for an order for payment to him of a sum of £5000 which he alleged to belong to the bankrupt's estate. The Registrar granted the application; and Mr. *W. Angerstein*, the bankrupt's father, who also claimed the fund, appealed from his decision.

Mr. *Fry*, Q.C., and Mr *Thesiger*, Q.C., Mr. *Winslow*, Q.C., and Mr. *F. H. Linklater*, appeared for the Appellant.

Mr. *Roxburgh*, Q.C., and Mr. *Douglas Straight*, for the trustee.

The LORDS JUSTICES were of opinion that the fund belonged to the Appellant, and discharged the order of the Registrar; and they ordered that the trustee should pay to the Appellant his costs of the application to the Registrar, which he might recover from the bankrupt's estate.

Mr. *Roxburgh*, Q.C., said that there was scarcely any estate, and the effect of their Lordships' order would be that the trustee would have to pay a great part of the costs personally.

SIR G. MELLISH, L.J.:—

It is quite right that the order should be in that form. The reason for ordering the trustee to pay costs is, that applications of this kind to the Court of Bankruptcy are in substitution for actions at law. In an action at law a trustee in bankruptcy would be liable in the same way as any other Plaintiff. In a case where a trustee makes an application the success of which is doubtful, he ought, before making it, to get from the creditors an indemnity against the costs, if he knows that there are no assets out of which

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they can be paid. I see no difference between the case of an official liquidator and a trustee in bankruptcy. With regard to the former, we have already laid down the rule that he must pay costs if he fails in an application.

SIR W. M. JAMES, L.J.:—

Mr. *W. Angerstein* has been brought into Court to meet an application which has failed, and he has a clear right to be indemnified against the costs. The rule has been established, rightly or wrongly, by our predecessors, that no costs are to be given of a successful appeal; but in all other cases I think that, in the absence of special circumstances, the costs ought to follow the event.

Solicitors: Messrs. *Linklater & Co.*; Messrs. *Lumley & Lumley*.

L. JJ. 1874 *April* 23.

OLLERENSHAW *v.* HARROP.

[1856 O. 21.]

Inrolment—Interlocutory Order—Rehearing.

An order was made staying all further proceedings in an administration suit. Some years afterwards one of the parties beneficially interested presented a petition praying that this order might be discharged, and that certain further accounts might be directed against one of the executors. This petition was dismissed in the Court below on the merits, and the order of dismissal was inrolled:—

Held, that although for some purposes an application to the Court of Appeal to discharge an order made on motion or petition in a suit is treated as a new application, the inrolment of the order dismissing the petition on the merits prevented the Court from entertaining a petition of rehearing.

THIS was a motion by the Plaintiffs, *Radley* and wife, that the inrolment of an order dated the 13th of February, 1874, dismissing their petition might be vacated, or that their petition of rehearing by way of appeal from that order might be heard by the Lords Justices notwithstanding the inrolment.

The bill was filed by *Sarah Ann Ollerenshaw*, since deceased, and Mrs. *Radley* (then a spinster and an infant), to carry into execution the trusts of the will of *Samuel Ollerenshaw*. In September, 1856, an order was made, granting an injunction to restrain *Brooke*, one of the executors, from intermeddling with the estate, and

appointing *Samuel Harrop*, the other executor, and Mrs. *Ollerenshaw*, receivers and managers, without salary and without security. In December, 1857, a decree was made directing accounts and inquiries.

By an order on petition, dated the 12th of August, 1863, Mrs. *Ollerenshaw* and *Harrop* were discharged from their receivership without accounting. Directions were given for payment out of the estate of a certain principal sum and a certain annuity, and all further proceedings in the cause were stayed.

On the 12th of July, 1873, after the death of Mrs. *Ollerenshaw*, *Radley* and wife presented a petition praying that the order of August, 1863, so far as thereby Mrs. *Ollerenshaw* and *Harrop* were discharged from liability to account as receivers and managers, and so far as all further proceedings against them were thereby stayed, might be discharged, and that the Petitioners might be at liberty, as far as might be necessary, to prosecute the inquiries and accounts directed by the decree, which had not been prosecuted, and that they might be at liberty to file a bill of revivor and supplement which had been prepared for reviving the suit, and for establishing various claims against *Harrop*.

On the 13th of February, 1874, Vice-Chancellor *Malins* dismissed the petition with costs. The order of dismissal was inrolled by *Harrop's* solicitors, and the Petitioners first became aware of this after presenting an appeal petition. They thereupon moved to the effect above stated. So far as regards vacating the inrolment there does not appear to be anything in the case to call for a report.

Mr. *Glasse*, Q.C., and Mr. *Bird*, for the motion :—

We contend that an order on an interlocutory application is not a proper subject for inrolment : *Staunton* v. *Oldham* (1) ; *Parker* v. *Downing* (2).

[The LORD JUSTICE JAMES referred to *Daniell's* Chancery Practice (3).]

The inrolment, at all events, will not prevent a hearing of the petition by the Court of Appeal, for an appeal motion or appeal petition is, in fact, a new application, and does not stand on the

(1) 2 Atk. 383. (2) 1 My. & K. 634. (3) 4th Ed. p. 918.

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same footing as an appeal from a decree: *Richards* v. *Platel* (1); *Attorney-General* v. *Mayor of Wigan* (2).

Mr. *J. Pearson*, Q.C., and Mr. *Hamilton Humphreys*, for the Respondent, were not called upon.

SIR W. M. JAMES, L.J.:—

The rule as to vacating inrolments has been settled by *Hill* v. *Curtis* (3). To inrol a decree is a matter of right, of which right a party cannot be deprived merely because he knows that the other party intends to appeal; he can only be deprived of it on some equitable ground, such as would be sufficient to deprive him of any other right. This being so, there is no ground here for vacating the inrolment. But it is said that the petition can be reheard notwithstanding the inrolment. In the case of *Attorney-General* v. *Mayor of Wigan*, which has been referred to, a similar point was raised in argument, but was not decided. That case, moreover, related to an injunction, and an appeal motion in an injunction case may stand on a very different footing from an appeal in a case like the present. An injunction may be rightly refused one day because the Court thinks the evidence insufficient, and may be rightly granted on a subsequent day, because there is sufficient evidence. So, in the case of applications to enlarge times of procedure. Here the petition seeks to enlarge the area of the accounts, and states the grounds on which the order is sought. The Vice-Chancellor, on the merits, came to the conclusion that the petition ought to be dismissed, and an appeal petition from that order cannot be treated as a new proceeding. It is not a fresh application on new materials, but a rehearing of the same matter. The case is in substance the same as if a supplemental bill asking for the same relief as the petition had been dismissed. The inrolment, therefore, is fatal to the Petitioners.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Johnson & Weatheralls*; Messrs. *Clarke, Woodcock, & Ryland.*

(1) Cr. & Ph. 79. (2) 5 D. M. & G. 52. (3) Law Rep. 1 Ch. 425.

COMMERCIAL UNION ASSURANCE COMPANY *v.* LISTER.

L. J. J. 1874 March 18.

[1874 C. 35.]

Insurance—Damages—Action—Indemnity—Subrogation.

The owner of a building insured it against fire, but not to the full value. The building was burnt by what was said to be the negligence of the servants of a municipal corporation; and the owner brought an action for damages against the corporation:—

Held (affirming the order of the Master of the Rolls), that the owner undertaking to sue for the whole amount of damage, would be allowed to conduct the action without the interference of the insurers, but would be subject to liability for anything done by him in violation of any equitable duty towards the insurers.

S. C. *LISTER*, the Defendant in this case, was a silk spinner at *Halifax*, and had there a large mill called *Wellington Mill*. On the 4th of December, 1873, an explosion of gas occurred in the *Wellington Mill*, which, with its contents, was thereby destroyed. The explosion was said to have been occasioned by the negligence of the servants of the corporation of *Halifax*, by whom the gas was supplied. The mill was insured in eleven fire insurance offices for sums amounting to £33,000. Mr. *Lister* estimated his damage at £56,000, of which £6000 was for consequential loss of profits, and this of course would not be in any way covered by the insurances. Mr. *Lister* had commenced an action against the corporation for the amount of his damage, and the eleven insurance offices filed the bill in this suit, praying for a declaration that they were entitled to the benefit of any right of action vested in the Defendant; and that the Defendant might be restrained from prosecuting his action otherwise than for the whole amount of damage; and might be restrained from refusing to allow the Plaintiffs to use his name for the purpose of any proceedings against the corporation.

The Plaintiffs moved before the Master of the Rolls for an injunction according to the prayer of the bill, and the Defendant by his counsel undertaking to sue the corporation for the whole

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amount of loss occasioned by the explosion, and in any compromise not to take into consideration his liability as a ratepayer of *Halifax*, His Honour did not think fit to make any order for the motion except that the costs should be costs in the cause (1).

(1) 1874. Feb. 19.

SIR G. JESSEL, M.R.:—

The point is really very simple. The Defendant insured his mill against fire with a great many insurance companies, and the mill was burnt. The total amount of the loss is admitted to exceed very largely the total amount of the insurances. It is alleged that the fire was caused, not by any act of the person assured, but by the act of the corporation of *Halifax*, or their servants, whose carelessness is alleged to have been the cause of the fire, and that the carelessness was of such a kind as to render the corporation liable for the whole of the loss. In that state of things the insurance company or companies is or are willing to pay the amount of the insurance, and they say that, having paid that amount (they pay of course by way of indemnity), if the assured obtains from the corporation of *Halifax* a sum larger than the difference between the amount of the insurance and the amount of the loss, he is a trustee for that excess for the insurance company or companies — a proposition which I take to be indisputable. But then they want to go further, and they assert that in such a case the insured person, though entitled to bring an action for the loss he has sustained, is not entitled to be master of that action; and they assert that, though he is bringing it *bonâ fide*, and is acting *bonâ fide*, he is not entitled to compromise that action, or to do anything else, without their assent.

I can find no ground whatever for such a suggestion. He is entitled to bring an action against the corporation for the injury to himself. He is entitled, and is bound, and has agreed, as there is one cause of action, to bring the action for the whole loss to himself, including that part of the loss against which he is indemnified by the insurance companies; and he is not entitled to compromise that action otherwise than *bonâ fide*.

Another objection was taken on a small point, that he was a ratepayer of *Halifax*, the town which would be ultimately liable to make good the loss if the action results adversely to the corporation, and that he would have regard to that fact in making the compromise. It is sufficient for me to say now that he is willing to undertake not to have regard to that fact, and therefore it is not necessary to discuss the question as to how far that compromise would be *bonâ fide*, even if he had regard to that.

Then, that being so, it appears to me that, on these undertakings being given, it would not be right to make any order on this motion. Following a rule laid down by Vice-Chancellor *Kindersley*, that on an interlocutory application the Court ought not to intimate, further than is absolutely necessary to decide upon the application to the Court, the opinion of the Judge on the merits of the question, I abstain from saying anything more. Upon that undertaking being given, I think there should be no further order, and that the costs of this motion should be costs in the cause.

The Plaintiffs appealed.

Mr. *Cotton*, Q.C., and Mr. *Cohen*, Q.C. (Mr. *Kekewich* with them), for the Plaintiffs:—

If the companies had to pay the whole of the loss, it is clear that they would be entitled to compel the Defendant to allow them to use his name in the action, and that they would have the sole conduct of the action, or, in other words, would have a right of subrogation. If the Defendant recovers the whole damage the companies will have nothing to pay: *Yates* v. *Whyte* (1); but if the corporation submit to pay the excess of the damage over the amount of the insurances, the Defendant will of course accept that compromise, and will have no inducement to prosecute the action for the full amount, as the companies would pay the difference. The Court should therefore interfere: *Randal* v. *Cockran* (2); *Dickenson* v. *Jardine* (3). It is absurd to say that if the insurance is for £1000, and the damage is £1001, then the insurers have it all in their own hands; but if the damage is £999, then the insured has it all in his hands, and they have nothing to do with the proceedings. It is very analogous to the case of principal and surety, when the surety has had to pay.

Mr. *Fry*, Q.C., and Mr. *Tapping* (Mr. *Graham Hastings* with them), on behalf of the Defendant, contended that there was no right of subrogation, the contract of the insurance companies being one of indemnity. Until the Defendant has been paid his whole loss he is in no sense a trustee for the companies. Why is the person principally interested not to have the conduct of the litigation? How can the fact of his having insured deprive him of his right to sue the corporation? Subrogation only arises when the whole damage has been paid: *Pothier* on Obligations, by *Evans* (4); *Pothier*, Ed. *Dupin* (5). Until the insured is paid the whole of his loss he remains *dominus litis*: and if the Plaintiffs think they can recover the whole damage, let them pay the whole to the Defendant.

(1) 4 Bing. (N.C.) 272.
(2) 1 Ves. Sen. 98.
(3) Law Rep. 3 C. P. 639.
(4) Page 160.
(5) Vol. x. p. 845.

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Mr. *Cohen*, in reply:—

The insurance companies cannot sue in their own name, and are entitled to use that of the insured. We say that it is the duty of the Defendant to recover the largest sum possible; but it is obviously not his interest to run the risks of litigation for that purpose if he can by compromise obtain what he wants.

SIR W. M. JAMES, L.J.:—

In this case the Master of the Rolls has put the Defendant under an undertaking to sue for the whole amount, and does not put him upon any other undertaking except that he is not to compromise with reference to his position as a ratepayer. The Master of the Rolls has, I understand, pronounced no decision and expressed no opinion as to what the undertaking would bind the Defendant to do. The Defendant has undertaken to sue for the whole amount; which means that he must sue for the whole amount whatever that amount may be. If I were to put him under any restriction about compromising, or anything of that kind, it would be determining the whole case, and deciding that he is a trustee for the insurance companies. That, however, is a matter not to be determined on this interlocutory application, and I cannot now say that he is a trustee in such a way that he is to be deprived of his own free action with respect to a matter in which he is personally and very largely interested. Then the Master of the Rolls, in the course of his judgment, threw out an observation that if the Defendant compromises, he must compromise *bonâ fide;* but what that is the Master of the Rolls has not determined, and I do not determine. Mr. *Lister* is by this order left free to go on with and to conduct this action. If he does anything in the conduct of the action inconsistent with his duty, whatever that duty may be (which will have to be determined at the hearing of the cause), he will have to make good any loss thereby incurred. If he does nothing else but that which he is clearly entitled to do, having regard to the position he is in, and to the position of the other parties, then he will be liable to nothing. At present he is himself *dominus litis*, subject to a liability to answer in this Court for anything which,

upon the hearing of the cause, should be shewn to be a breach of some equitable obligation or a violation of some equitable duty which has been cast upon him by reason of the circumstances of the case. Upon this I do not at present intend to express any opinion, and I shall leave it exactly where the Master of the Rolls has left it, as a matter to be determined at the hearing of the cause, if it should ever arise. But I agree that the undertaking not to compromise with regard to his position as a ratepayer ought not to remain. It seems to me almost idle to make such a provision, but I am told that nobody objected to it below, and that it was accordingly introduced. I understand that the Plaintiffs do not wish that part to be continued, and I shall strike the words out, but that will not affect the question of costs. With that exception, I shall make no order upon this motion, except that the Appellants pay the costs of the appeal.

Solicitors for the Plaintiffs: Messrs. *Dawes & Sons.*
Solicitors for the Defendant: Messrs. *Speechly & Chamberlain.*

L. JJ.
1874
April 28.

WARD *v.* SITTINGBOURNE AND SHEERNESS RAILWAY COMPANY.

[1873 W. 160.]

Dissolved Company—Shareholders—Creditor's Right to sue—Misjoinder—Multifariousness—Demurrer ore tenus.

A bill was filed against a railway company by a creditor and shareholder of the company on behalf of himself and all other creditors and shareholders, and stated that under an Act of Parliament the company was to transfer its property to another railway company, and be dissolved, the purchasing company issuing to the selling company stock to a large amount; that the proceeds of the sale of the stock were to be applied by the selling company in discharge of certain liabilities, and the surplus was to be divided between the creditors and preferential shareholders; that the selling company had transferred its property, but had not paid its creditors or shareholders; and the bill prayed that the company might be wound up and the accounts taken:—

Held (affirming the order of *Malins*, V.C.), that a demurrer to the bill for want of equity would not lie; but

Held, that the bill was demurrable for multifariousness and misjoinder, by reason of the adverse interests of the preferential and ordinary shareholders, and a demurrer *ore tenus* allowed.

THE bill in this case was filed by *James Ward*, "on behalf of himself and all other the creditors and shareholders of the *Sittingbourne and Sheerness Railway Company*," against the railway company.

The bill stated that the company was incorporated by Act of Parliament in the year 1856.

That by an Act passed in 1866, it was enacted that certain heads of an agreement between the company (therein called the *Sheerness Company*) and the *London, Chatham, and Dover Railway Company* (therein called the *Dover Company*), were confirmed and made binding; that the undertaking, railway-stations, lands and properties of the *Sheerness Company* (exclusive of certain lands, rates, and privileges, as to which provisions were made,) should be vested in the *Dover Company* and amalgamated with their undertaking; that the *Sheerness Company* might and should create and issue £155,556 "*Sheerness* Rent-charge 4½ per Cent. Stock," which should be stock of the *Dover Company*, and might and should be sold and disposed of by the *Sheerness Company*; and that when the

affairs of the *Sheerness Company* were wound up and notice thereof was advertised in the *London Gazette*, the *Sheerness Company* was to be dissolved and thenceforth wholly cease to exist.. That by the heads of agreement, it was (with many other things) agreed that the *Sheerness Company* were to appropriate the £155,556 stock and the proceeds of any sales thereof, first, in payment of landowners' claims; secondly, in discharge of a certain mortgage debt of £39,000; thirdly, in discharge of the *Sheerness Company's* costs and expenses subsequent to 1863; fourthly, that the surplus be divided between and disposed of or paid to the *Sheerness Company's* preferential shareholders and creditors other than mortgagees, in rateable proportion to the respective amounts of their preferential shares and the debts, whether secured or unsecured, due to them from the *Sheerness Company*. It was also agreed that the *Dover Company* were to issue to the ordinary shareholders of the *Sheerness Company*, holding *bonâ fide* capital in that company to the extent of 4805 shares of £10 each, on which the whole amount should have been fully paid up in rateable proportion to the amounts paid on their shares, fully paid up ordinary stock of the *Dover Company's* capital, at the rate of £50 of that ordinary stock for £100 paid upon those shares.

That immediately after the passing of the Act of Parliament, the *Sheerness Company* transferred the *Sittingbourne and Sheerness Railway* and other works to the *Dover Company*, and since such transfer had entirely ceased to carry on any business as a railway company, and had only carried on business for the purpose of winding up its affairs. That the *Sheerness Company* was not now a railway company incorporated by Act of Parliament within the meaning of the 199th section of the *Companies Act*, 1862.

That no meeting of the *Sheerness Company* had been held since 1871, and there was now no properly constituted board of directors. That the winding-up of the affairs of the company had been grievously neglected and mismanaged, and the dissolution of the company, although in effect the same had long since taken place, had never been advertised in the *London Gazette*.

That the affairs of the *Sheerness Company* ought to have been wound up long since, and that ample time and opportunity had existed since the year 1866 for taking the accounts of the company

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and winding-up its affairs, but that such winding up was wilfully delayed by the *Sheerness Company*, its directors, officers, or agents.

That the Plaintiff was the solicitor of the *Sheerness Company* from the time of its formation until May, 1872, and during that time the company became indebted to the Plaintiff in large sums of money for bills of costs which the Plaintiff had from time to time delivered, but the company had wilfully neglected to pay the same, although the Plaintiff had frequently demanded payment thereof.

That there was now an open and unsettled account between Plaintiff and the *Sheerness Company*, upon which a large balance was due to the Plaintiff. That the company was also indebted to divers persons other than the Plaintiff in large sums of money, and was unable to pay its debts.

That the Plaintiff was also a shareholder of the company to the extent of 700 shares, which were fully paid up, and that under the arrangement with the *Dover Company* the Plaintiff was entitled to receive from the *Sheerness Company* shares in the *Dover Company*.

That the alleged directors of the *Sheerness Company* were not legally competent to act in the affairs of the company, and there were now no person or persons legally entitled to get in and receive the assets of the company, and such assets were in danger of being squandered and lost. That the *Sheerness Company* was, in fact, dissolved, and that it was just and equitable that the company should be wound up. And the bill prayed that the *Sittingbourne and Sheerness Railway Company* might be wound up by order of the Court, and that the Plaintiff might be at liberty to use the name of the company to collect and get in the assets of the company; and further prayed for accounts and a receiver.

To this bill the *Sheerness Company* demurred for want of equity.

The Vice-Chancellor *Malins* overruled the demurrer (1).

(1) 1874. Mar. 12. W.N. (1874) 68

SIR R. MALINS, V.C.:—

This is a case of a very peculiar nature, and certainly, in my opinion, by no means free from difficulties. The application here is, in effect, for an account of the proceedings of the Defendants, the *Sittingbourne and Sheerness Railway Company* — a railway company established by an Act of

The *Sheerness Company* appealed.

Mr. *Glasse*, Q.C., and Mr. *Bevir*, for the Appellants:—

The Court will not interfere to enforce the duties of a corporation. The Plaintiff is a shareholder, and could have a

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Parliament. If it is still a subsisting railway company incorporated by Act of Parliament, then it is quite clear that the 199th section of the *Companies Act*, 1862, 25 & 26 Vict. c. 89, excludes it from the winding-up process under that Act; and I am very strongly of opinion that where a company cannot be wound up under that Act it would not be proper that it should be wound up by a bill in this Court. If, therefore, in the ordinary sense of the word, this is still a subsisting railway company, incorporated by Act of Parliament, there is, in my opinion, no jurisdiction to wind it up, and the demurrer should be allowed. [His Honour then read the principal allegations in the bill.]

I must say I can only look at the Act of Parliament of 1866, although my first impression was the other way, as an Act to wind up and ultimately dissolve the *Sheerness Company*.

Now this is a demurrer to the whole bill for want of equity, and the principles of the Court on this subject are very well known. A demurrer to a bill will necessarily succeed if it is perfectly clear to the Court that if the suit is carried on to a hearing nothing can be made of it; and if that is so, the sooner the parties are eased of the litigation the better. But if there is any part of the bill which at the hearing may succeed, then the demurrer is not allowed, and the case is allowed to go to a hearing.

Then, is this a case in which the Plaintiff ought to be summarily turned out of Court? What is the case he states by his bill? First, this is not an Act of Parliament to continue the *Sheerness Company* as an incorporated company, in the ordinary sense of the word, namely, a railway company within the meaning of the 199th section; but it is an Act of Parliament to wind up the company, to actually dissolve it, and to amalgamate it with the *London, Chatham, and Dover Railway Company*, and its debts are to be paid. The Plaintiff states by his bill and the demurrer, of course, admits the truth of his statement, that "he was the solicitor of the *Sheerness Company* from the time of its formation until the month of May, 1872, and during that time the company became indebted to him in large sums of money for bills of costs, which the Plaintiff has from time to time delivered to the company, but the Defendant company has wholly neglected to pay the same, although the Plaintiff has frequently demanded payment thereof."

Therefore he cannot, according to the allegations in his bill, get a penny from this company, although they have actually received or are entitled to receive £155,556 stock in the *Dover Railway Company*, which, as far as I know, may be worth par. The creditor further alleges that there is nobody to manage the company, and that there is great danger, if nothing is done, that the assets will be squandered and lost.

The bill then states that the company had ceased to carry on business, and had, in fact, been dissolved, though the dissolution had not been advertised in the *London Gazette*. It struck me

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meeting called and compel the directors to do their duty. Unless that plan has failed, he cannot file a bill like this. Moreover the rights of the ordinary shareholders, the preferential

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at first that that was an allegation which would be fatal to this bill, because it went to shew that the Defendants were still an incorporated company; but, upon full consideration, I think it goes to support the bill, because, if it had been duly advertised, the company would have been dissolved and could no longer be sued; whereas the allegation is put in to shew that it still has a legal existence, and therefore is capable of being sued. That is the way I look at the allegation.

Then what is the case I have before me? If the Plaintiff, who was the solicitor of this company, has no remedy by this bill, I am at a loss to see what his position would be. He ought not to be left in the condition of having acted as solicitor to this company for many years, and having a large balance due to him. If they have assets he ought to have the advantage of being paid in common with the other creditors. What, then, is to be done? It was argued that I could not interfere, because these are the internal affairs of a company, and that therefore the cases of *Mozley* v. *Alston* (1 Ph. 790), and *Foss* v. *Harbottle* (2 Hare, 461), and cases of that kind, and *Lord* v. *Company of Copper Miners* (2 Ph. 740) apply. It was also argued that if this bill could be maintained, every creditor of a company who is not paid a debt will file a bill. I do not give sanction to the notion that such bills can be sustained. *Foss* v. *Harbottle* and those other cases have relation to going companies, and if this Plaintiff had filed a bill against a going company to establish his debt he would have come to the wrong forum. He ought to have gone to law, and there obtained and enforced his judgment as best he he could. Those cases have no application to a company like this, which is, by Act of Parliament, dissolved and wound up; and all this bill does is to seek to enforce the winding-up and to provide that justice is done under it. Remedy there must be somewhere. Under the *Companies Act* I am not disposed to think there would be any, because the company may not be liable to that Act; but at the same time the cases *Jones* v. *Lord Charlemont* (16 Sim. 271) and *Clements* v. *Bowes* (17 Sim. 167), and particularly *Jones* v. *Lord Charlemont*, apply on that part of the case. The report of that case is very unsatisfactory, but I presume that the company there was an incorporated company [This appears from the report in 12 Jur. 532, not to have been the case]; and that was a case in which Sir *Lancelot Shadwell* held that the jurisdiction of this Court was not ousted by the Winding-up Acts when a proper case existed for investigation of accounts.

This is a plain case for investigation of accounts. It is a case in which the Plaintiff is a shareholder and creditor, and he should have an account of what the company have been doing under this winding-up process. Whether he is ever likely to get anything I do not say. He certainly cannot get anything under the Winding-up Acts nor by an action, and therefore he must be able to do so by bill; because the tribunals of this country cannot be in such a state that a creditor and shareholder in the situation of this Plaintiff is absolutely without remedy, and I

shareholders, and the creditors, are so conflicting that it is impossible for relief to be obtained on this bill; and, if necessary, we demur on that ground *ore tenus*.

Mr. *Gill* (Mr. *Higgins*, Q.C., with him), for the Plaintiff:—

This company has been so far dissolved that we cannot call a meeting of shareholders. There is nothing left for the company or the directors to do except to receive this money and distribute it, and that they refuse to do. The Plaintiff could not have sued on behalf of the creditors alone: *Clements* v. *Bowes* (1). There is no conflict of claims between the creditors and the shareholders. If after payment of the preferential shareholders and creditors there is a surplus, the ordinary shareholders may get it. There will be no difficulty in working the decree; and in that case no objection can now be taken for multifariousness or misjoinder.

SIR W. M. JAMES, L.J.:—

I am of opinion that there is a ground of equity alleged by

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am at a loss to see that he has any other remedy than by a bill in this Court.

This bill may not be the very best framed bill, and may require amendment; but the question is, whether I can come to the conclusion that this bill is so utterly devoid of equity that I must allow the demurrer, and summarily send this Plaintiff out of Court without any remedy for the gross injustice which, according to this bill, has been done to him?

When I come to hear the motion for a receiver, it may turn out that these allegations are displaced. I can only, upon the demurrer, take them as stated, and by the demurrer admitted to be true.

Therefore, in coming to the conclusion that I must overrule this demurrer, it must be distinctly understood that I do not in the slightest degree infringe upon any of those cases to which I have been referred. I do not interfere with the principle that a company incorporated by Act of Parliament is not to be wound up in this Court; but I come to this conclusion because the Legislature has said that this company shall be absolutely dissolved; and when the Legislature has in effect dissolved a company I cannot regard it as a railway company within the meaning of the 199th section. Therefore, without going further into the merits, whatever the merits may be, I cannot say that this bill is demurrable on these grounds. The demurrer, therefore, will be overruled.

(1) 17 Sim. 167.

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the bill sufficient to sustain some bill for some purpose in this Court. The Act of Parliament has provided for the *Dover Company* absorbing the *Sheerness Company*, and has imposed upon the *Sheerness Company* a clear trust as to its assets. They were to receive a certain sum from the *Dover Company*, and when that sum had been received they were to make a certain application of it, and to give the surplus between the company's preferential shareholders and the creditors; that is to say, it has made the preferential shareholders take *pari passu* with the creditors. It was the duty of the company to receive and divide this money. There was by force of the Act of Parliament the relation of trustee and *cestuis que trust* existing between the company and that class, and the bill alleges that the company has neglected its duty and has taken no step to do it. In that respect relief may be given at the hearing as regards the assets which have not been distributed among that class.

But the Plaintiff has not contented himself with filing a bill on behalf of himself, the creditors, and the preferential shareholders; but has filed a bill on behalf of himself and the ordinary shareholders, who are dealt with in a totally different way by the Act of Parliament, and who are to have from the *Dover Company*, and not from the *Sheerness Company*, certain shares. It has been alleged in support of the bill, that there may be a question if, when the preferential shareholders and the creditors are paid, there should be still a surplus, the ordinary shareholders may be entitled to get it. That is entirely an adverse claim. A man cannot file a bill for two adverse sets of claimants to have relief. In one case the creditors and preferential shareholders would be entitled to get the whole; and it is possible that the ordinary shareholders—although I do not see exactly how—may be entitled to some part of that surplus instead of its going entirely among the others. That is entirely an adverse claim to the claim of the creditors and preferential shareholders. I think the Vice-Chancellor was right in overruling the demurrer for want of equity; but the demurrer for multifariousness and misjoinder must be allowed. As, however, that is not the ground taken by the written demurrer, the demurrer must be allowed without

costs, and there will be no costs of the appeal. There will of course be liberty to amend.

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SIR G. MELLISH, L.J.:—

I am of the same opinion.

Cur.:—Affirm the order dated the 12th day of March, 1874. And the said Defendants now demurring *ore tenus*, for that the bill is filed on behalf of the Plaintiffs and all other the creditors and shareholders of the company, which is a misjoinder, inasmuch as the creditors and shareholders of the said company have adverse interests, and also that the objects of the bill are multifarious as between the preferential and ordinary shareholders of the said company, hold the said demurrer *ore tenus* for misjoinder and multifariousness to be good and sufficient, and order the same to stand and be allowed, but without costs.

Solicitors for the Plaintiff: Messrs. *Taylor, Mason, & Taylor.*
Solicitor for the Defendants: Mr. *Scott Lawson.*

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L. JJ. 1874 May 2, 3, 5, 26.

[1867 E. 69.]

Fund and Defendants out of Jurisdiction—Benefit Society—Insurance—Payment—Trustees—Statute of Limitations—Express Trust.

A bill was filed against four trustees in *India* of a fund in *India*, and one formal Defendant in *England*, to recover money payable in *England*. The trustees were served out of the jurisdiction, appeared and answered, and entered into evidence:—

Held, that as the Defendants had not demurred or pleaded or moved to discharge the order for service, the Court might determine the questions between the parties.

By resolutions of an association in the nature of a benefit society, certain pensions were to be given to the widows of the members, and each member was to pay to the association a percentage on his income. Six months afterwards the operation of these resolutions was suspended:—

Held, that the widow of a member who had not paid or tendered the requisite percentage had no claim to a pension under the resolutions.

The funds of the association were vested in trustees:—

Held, that neither they nor the association were trustees for the widow of any member, so as to prevent the claim from being barred by lapse of time.

Decree of *Bacon*, V.C., varied.

Varied by & substantially affirmed by H. of L. 10 App Cas 281

IN the year 1804 an association, called the *Civil Service Fund*, was founded at *Bombay* for the purpose of giving assistance and

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annuities to such of the subscribers, being civil servants of the *East India Company*, as should be compelled by ill health to leave *India*, and of providing pensions for the widows and children of subscribers. Alterations were from time to time made in the constitution of the association, and in 1825 it was completely remodelled, and subscription was made compulsory on all persons thereafter becoming members of the civil service, and new rules were adopted, some of them intended to accelerate promotion by providing annuities of £1000 a year for a certain number of members desirous of retiring, such persons to be paid in *England* and in English money. By the 11th article of the new rules it was provided that the widow of every member should be entitled to a pension of £300 a year; but if she had other property, her pension should be reduced so that the income should not exceed £500 a year; and by the 12th article, the child (if a girl) of any member dying should be entitled to a pension of £100 a year until she was nineteen years old, and then to a sum of £500; but if the child had a mother living, and her income exceeded the sum appropriated for her in the 12th article, then such allowance only should be made as, taken together with the surplus above the sums mentioned in the preceding article, should make up the sum intended to be provided for the maintenance and education of the child or children. The same deduction if the father or any other person had made provision for the child. In estimating the income of a child or children the property left by a deceased member was to be considered as the property of the widow and children collectively in settling their claims upon the fund.

It was also provided that the whole property of the fund should be vested in trustees, consisting of the committee of managers for the time being, who were to be five *ex officio*, viz., four high government officials and the secretary of the fund, and four others elected annually. By the original constitution of the association a majority of three-fourths of the subscribers had power to alter the rate of contribution, the rate or grant of pensions or annuities, and to make any addition to or change in the rules and regulations of the association; and a similar provision was contained in the rules of 1825.

The provision that the property should be vested in the

managers as trustees was, however, never acted on, as the funds were left in the treasury of the Government on behalf of the association, and existed only as a floating debt of the state.

In the year 1826, at a general meeting of the association, resolutions were carried, on the proposal of a Mr. *Farish*, that the pensions to widows and children should henceforward be granted in all cases, whether the widow and children had or had not other property; but in order to entitle a member to the benefit of this resolution on behalf of his family after he should have accepted the annuity, he should subscribe to the charitable fund one per cent. on his annuity. The operation of these resolutions was, however, suspended until the consent of the court of directors could be obtained. The consent was not obtained for some years. It was at length obtained, and at a meeting held on the 5th of January, 1830, Mr. *Farish's* resolutions were carried, and a subscription at the rate of two per cent. was voted.

It appeared to have been considered by the trustees that the increased burthen on the fund which those resolutions would occasion could not be borne without additional resources, and it was therefore proposed by them, at a meeting held on the 8th of June, 1830, that the increased subscription should have a retrospective operation from the 1st of May, 1825. This proposition was rejected, and in consequence of its rejection Mr. *Farish's* resolutions were again suspended by the unanimous vote of that meeting.

Communication had been made to the English agents of the fund for the purpose of it being intimated to the annuitants then in receipt of their annuities, that the suspension of Mr. *Farish's* resolution had been removed, and in effect inviting them to avail themselves thereof. Before anything, however, was done on this, a further communication was sent, announcing that the resolutions had been again suspended, accompanied by an intimation in effect that the right of the annuitants was suspended, but that if and when the suspension was again removed they should receive due notice, so as to be able to avail themselves of their right to contribute.

Mr. *Flower*, the father of Mrs. *Edwards*, the Plaintiff in this case, had been a subscriber to the fund from its foundation and assented to the alterations made in 1825. In the early part

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of 1830 he retired, taking an annuity of £1000 from the fund, and ceasing to be a civil servant as from the 1st of May, 1830. He was, therefore, a member who became an annuitant after and while Mr. *Farish's* resolutions had come into and were in operation.

In the opinion of their Lordships, it might fairly be presumed that Mr. *Flower* was informed of the communications as to Mr. *Farish's* resolutions, made to the agents in *England* above mentioned.

Mr. *Flower* never did in fact subscribe, or take any step, or do any act with reference to Mr. *Farish's* resolutions, and he continued to receive his annuity in full up to the time of his death. He died on the 11th of February, 1834, leaving a widow and an only daughter, afterwards Mrs. *Edwards*, wife of *Tenison Edwards*, surviving him.

Mrs. *Flower*, in 1838, made applications for payment of a pension, which applications were refused.

At a meeting of the association, held on the 18th of February, 1840, a fresh set of rules and regulations for the management of the fund, following *Farish's* resolutions, were adopted. By these new rules it was provided (Art. xi. s. 2) that a widow's title to a pension should not be affected by her possession of property; (Sect. 3) that the benefit of that provision should be extended to those widows then on the fund whose husbands were alive and in the service on the 1st of January, 1830, provided the enhanced rate of subscription was paid by them; and (Sect. 4) that the claims of all widows to whom the provisions of the revised rules did not extend should be considered under the regulations in force on the 30th of April, 1825.

Mr. *Flower's* daughter attained the age of twenty-one years on the 15th of October, 1842, and on the 13th of March, 1843, Mrs. *Flower* wrote to the English agents of the fund, stating (as was the fact) that under the will of her husband her daughter, on coming of age, had become entitled to receive £6000, the interest on which had hitherto been paid to the mother; her income was consequently reduced to £422, and she hoped to have it increased to £500 in accordance with the regulations of the Civil Service Fund. This letter was referred to the trustees of the

fund in *India*. The secretary answered that a similar case in 1830 had been discussed, and it was then determined that in cases of bequest by a member of the fund the property left should be considered as the property of the widow and children collectively, and therefore Mrs. *Flower's* application could not be acceded to.

Mrs. *Flower* died on the 23rd of December, 1863, and administration of her estate was granted to Mrs. *Edwards*. The original bill in this suit was filed on the 30th of July, 1867, by *Tenison Edwards* and his wife. It was subsequently amended, and, as amended, was against the trustees of the fund and the Secretary of State for *India*, and prayed for a declaration that Mrs. *Flower* was entitled to an annuity of £300 a year from the death of her husband, and for payment of the same, with compound interest at the rate of 8 per cent.; and similar declaration and relief as to an annuity of £100 a year to the daughter, and a sum of £500 payable on her attaining the age of nineteen. All the Defendants, except the Secretary of State, were at that time in *India*, and were served out of the jurisdiction.

The Vice-Chancellor *Bacon* made a decree for payment to Mrs. *Edwards*, as administrator to Mrs. *Flower*, of an annuity of £300 a year from the death of Mr. *Flower*, with interest at 5 per cent., deducting the payment of 1 per cent. on the annuity of Mr. *Flower*, and ordered the Defendants, the trustees of the fund, to pay the costs of the suit.

The trustees appealed.

Mr. *Cotton*, Q.C., Mr. *Kekewich*, and Mr. *Hornell*, for the Appellants:—

Farish's resolutions did not become part of the binding resolutions of the body till 1840. If Mr. *Flower* had made a tender before he left *India*, and it had been accepted, there might have been evidence of a contract; but he never offered anything—he did not like to bear the burden, and cannot claim the benefit. Then we contend that the lapse of time is fatal to the present claim. Even if the *Statute of Limitations* does not apply, the demand must be rejected as a stale demand. The right to the annuity, if it arose at all, arose in 1834, and the bill was not filed till 1867. It is not a case of direct trust within any reasonable sense of that

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expression. The case is like that of a disputed claim by a member of a mutual insurance society against the society: *Browne* v. *McClintock* (1).

Mr. *Macnaghten*, for the Secretary of State for *India*.

Mr. *Kay*, Q.C., Mr. *Miller*, Q.C., and Mr. *J. Beaumont*, for the Plaintiffs:—

Besides what the decree of the Vice-Chancellor has given to the widow, we ask for the daughter's pension. Mr. *Farish's* resolutions were only suspended till the court of directors assented to the division of the fund, and Mr. *Flower* having retired while *Farish's* resolutions were in force, no subsequent alteration of the rules could affect his rights. He had no opportunity of paying. But if there was any doubt on the subject, the regulations of 1840 clearly recognised and established the right of Mrs. *Flower* to a pension irrespective of her other income. There were three classes of widows to be provided for, and these resolutions provide for them separately: First, widows becoming such in the future, who were under the system thereby established; secondly, widows of members who were in the service on the 1st of January, 1830, whose husbands had come in under the rules of 1825 and paid the then enhanced subscriptions; and, thirdly, widows of members who remained under the old rules of 1804. Mrs. *Flower's* case was provided for by the 3rd section, and the words, "provided the enhanced rate of subscription was paid by them," did not affect her, and were only inserted to exclude the widows of members who were in the service on the 1st of January, 1830, although they had not come in under the rules of May, 1825. And then the 4th section applies to widows under the rules of 1804.

Our claim cannot be barred by the *Statute of Limitations*, or by any analogous rules. The money we claim was always ours, and was held by these trustees for us. It is still in the hands of the Indian Government, and is ear-marked. In fact, the whole society were trustees for us, and had no right to take our money for their own use. That is the real test.

As to our right to sue in this Court, *Boldero* v. *East India Com-*

(1) Law Rep. 6 H. L. 456.

pany (1) and *Innes* v. *Mitchell* (2) are authorities. The money was to be paid here, and the Secretary of State for *India* is here.

Mr. *Cotton*, in reply.

May 26. SIR W. M. JAMES, L.J., now delivered the judgment of the Court. His Lordship, after stating the facts of the case, continued:—

The Defendants to the Bill are four persons who are or were members of the committee of management and the secretary of the association, as representing the entire body, and the Secretary of State in Council for *India*.

The Secretary of State has taken no part in the discussion before us. The other Defendants insist that the suit ought not to have been instituted in and ought not to be entertained by this Court, the proper forum being the High Court at *Bombay*. But they admit at the Bar that, if the suit could be sustained in this country against the association or body by members representing it, they may be taken as sufficient representatives of such association or body.

It certainly does seem a very strong proceeding for a Court of Justice in this country to summon an association of members at *Bombay*, who, from the nature of the society, must be all public servants there, and to call on the managers and trustees of that body, who must be for the most part engaged in the performance of high official duties at, and be all actually resident in, *Bombay*, to come in and plead and litigate here.

It is to be observed that, by the rules, the annuities to widows and children are payable in English money, and are to be paid in *England*, if the annuitants reside in *England*, or elsewhere in *Europe*. We think, however, that it is unnecessary to determine whether the circumstance of the annuities being made payable in *England* gives jurisdiction to this Court to enforce payment, because, assuming that, if a motion had been made to discharge the orders for the service of the bill in *India*, or if the objection to the

(1) 11 H. L. C. 405. (2) 4 Drew. 141.

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bill had been raised by plea or demurrer, it would have been fatal; still, having regard to the fact that the Defendants did appear unconditionally to the suit, that no application was made to discharge the service of the bill in *India*, that no objection to the jurisdiction was raised, either by plea or by demurrer, that the case has been fully litigated here with pleadings, evidence, and argument, on all points, and that the Government of *India* really holds the money, and has taken no objection to the suit, we think that we ought to deal with and determine the questions which have arisen between the parties.

First, then, as to the right of the widow and daughter to the benefit of Mr. *Farish's* resolutions.

It is contended, and we think rightly, that Mr. *Flower* having ceased to be a member, and having become an annuitant after the suspension had been removed, and before it was re-introduced, he became for himself, his wife, and daughter, absolutely entitled to the benefit of those resolutions, and that the members could not by any subsequent Act deprive him of his vested right. But what was that right? A right by subscription to a fund during his life to obtain after his death a certain benefit to his wife for her life, if she should survive him, and a certain benefit to his daughter, if she should survive him and be then a minor. It was a right to have what was an exact equivalent to a very ordinary policy of insurance granted by an insurance office. But it is of the essence of all such contracts that the premium should be paid, and there is no distinction between the subscription in this case and the premium payable to an insurance office. Then it is said that in this case the association, by suspending the resolutions before Mr. *Flower* could contribute, and by their communications to the *London* agents, had deprived him of the means of subscribing, and had, therefore, absolved him from the performance of the condition precedent.

But there is, in our opinion, a fallacy in treating this as a waiver of a condition precedent, or as anything analogous to that. What Mr. *Flower* had, was a right to purchase an insurance for a certain sum of money, or certain annual payments. He was told that the whole scheme, including the granting of the insurance, was for the present suspended. He acquiesced in that arrangement, and

never paid or tendered his money. It was, at the utmost, a rescission of a contract giving a right to purchase. He might, of course, have disputed the right to rescind or suspend, but he was bound to do so at once, or within a reasonable time, and to insist on his right to pay his subscription or premium and obtain his insurance. It is like a contract for the sale of a lottery ticket. If the contract is rescinded by the vendor, and the purchaser acquiesces therein and keeps his money without tender, protest, or objection, it would be impossible for him afterwards to insist on the contract, and claim the prize if the ticket should have drawn one.

It is further said that in this case the annuitants were induced to acquiesce by a promise contained in a letter from the secretary, dated the 9th of September, 1831. [His Lordship then read the letter, and concluded that it did not support the contention of the Plaintiffs, and that in this case one is apt to be misled by the fact that Mr. *Flower* died so soon after he began to receive his annuity, and that the widow lived so long after him.] It was said to be obvious that if the association had not prevented him, Mr. *Flower* would have paid the few pounds a year subscription required to secure the great benefits he would thereby have secured. But it is of the very nature of life insurance, and of all contingent benefits connected with life, that if the payer dies immediately, or soon after, the benefit obtained should seem enormous compared with the price paid. It is impossible to predicate of the annuitants generally, or of any particular annuitant, that they or he would have accepted the option. What a man may have thought of his own chance of life, or of his wife's, or of his chance of marrying a wife at all, or whether his means were such as to make the difference between the regulations of 1825 and Mr. *Farish's* resolutions immaterial, are things which it is impossible to speculate upon with a view to place the widow and child of a man who had not subscribed on the same footing as if he had subscribed.

It is not unimportant also to bear in mind that the whole class of annuitants acquiesced in the suspension, and that if any attempt had been made in or soon after 1830 to enforce the rights of the annuitants to subscribe under Mr. *Farish's* resolutions, it is by no means improbable that an appeal might have been successfully made to the court of directors on the ground that a new burthen

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was created without any adequate corresponding resource. [His Lordship then read a letter written in 1842 by the directors.]

We have arrived at the conclusion that even if the claim under Mr. *Farish's* resolutions had been prosecuted immediately upon or soon after the death of Mr. *Flower*, or after the subsequent removal of their suspension, it could not have been sustained.

There is, however, a subordinate claim, which arises under the 11th regulation of 1825. [His Lordship then read portions of the regulation.]

Now Mr. *Flower* left property exceeding £500 a year; but £6000 sterling of that was left to his daughter, the interest to be paid during her minority to the widow for the maintenance and education of the daughter. The daughter came of age on the 15th of October, 1842, and on the 13th of March, 1843, the widow wrote and sent a letter as follows:—[His Lordship then read the letter.]

This letter was laid before a general meeting, but the request therein contained was not acceded to. It was considered, and it has been argued before us, that she was not entitled to the further allowance claimed. [His Lordship then read the articles relating to the pensions, and discussed the construction to be put on them.]

We are of opinion, therefore, that the claim of the widow ought to have been allowed, not from any earlier date or to any greater extent than is stated in her own letter, but on the footing of that letter, viz., that as from the 15th of October, 1842, her income had been reduced to £422.

To this claim, however, the association raises a very formidable objection, arising from the lapse of time and the equitable rules adopted by analogy to the *Statute of Limitations*. To this it has been replied that this being a case of an express trust—the fund being a trust fund—the rules as to time have no application.

We are unable to accede to this view. There was no relation of trustee and *cestui que trust* between any person or persons and Mrs. *Flower* or her representative. The managers, it is true, are called trustees, but they are trustees (so far as they are trustees at all) for the association, not for persons having claims against the property of the association. It is, in our judgment, impossible to distinguish this case from the case of a claim against the *Equitable*

Assurance Office, or any other mutual assurance society, whose accumulated funds and current income are the sole assets out of which a claim in respect of a policy could be satisfied. There is no fiduciary relation between such a body or its trustees and a policy-holder or the grantee of an annuity.

Even in the case of a common partnership, where the surviving partner took the duty of realising the assets and winding up the affairs of the partnership for the benefit of himself and the estate of the deceased partner, it was held by the House of Lords in *Knox* v. *Gye* (1) that a suit by the representative of the latter was barred by the lapse of six years.

We are unable to suggest any principle on which this fund, society, or association, or whatever it may be called, is precluded from setting up the same defence. It is said that in this case the fund has become, from accumulations at high compound interest, very rich; but it is easy to conceive that the converse might have happened, while at the same time it is difficult to see why contributions should be levied from the civil servants of 1867 to 1874 to meet a claim which ought to have been satisfied, and might have been enforced, out of the income of 1843. The defence arising from lapse of time must be the same, whether the association be rich or poor.

The claim, however, appears to be in substance, a claim to a sum of money payable *de anno in annum*, and, as to so many of such annual sums as became due within six years before the filing of the bill with interest from the filing of the bill, we think the Plaintiffs are entitled to a declaration and decree. The amount can be easily calculated and put into the decree.

Our order will be to discharge the decree of the Vice-Chancellor and in lieu thereof to dismiss the Plaintiffs' bill so far as regards the first part of the prayer, to declare that there ought to be paid to the Plaintiffs the sum of £ (being the amount which accrued due to Mrs. *Flower* in respect of an annuity of £78 between the 30th of July, 1861, and the 23rd of December, 1863,) with interest thereon at 5 per cent. from the 30th of July, 1867, the date of the filing of the bill.

Although this is a very small matter compared with the real

(1) Law Rep. 5 H. L. 656.

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claim made in the suit, we think we are justified under all the circumstances of the case in not making any order as to costs.

And we desire to repeat what was said by us at the close of the arguments, that the association in its present circumstances would be acting properly in not insisting on the lapse of time with respect to Mrs. *Flower's* application of March, 1843, which we think was refused under a misconception as to the meaning and legal effect of the rules of 1825.

Solicitor for the Plaintiffs: Mr. *W. A. Day.*

Solicitors for the Trustees of the Fund: Messrs. *Freshfields & Williams.*

Solicitors for the Secretary of State: Messrs. *Lawford & Waterhouse.*

L. JJ. 1874 *April* 17.

Ex parte HOPKINS. *In re* HART.

Bankruptcy—Liquidation by Arrangement—Removing Trustee and Committee of Inspection—Bankruptcy Act, 1869, *s.* 83, *sub-s.* 4, 12—*Bankruptcy Rules*, 1870, *rr.* 120, 304, 305, 307.

W.N. 1873. 14 Ch. D. 92

The trustee in a liquidation by arrangement, and any member of the committee of inspection, may be removed, and others appointed, by a special resolution of the creditors, summoned under rules 304 or 305 of the *Bankruptcy Rules*, 1870.

The rules in the *Bankruptcy Rules*, 1870, relating to bankruptcy, and those relating to liquidation by arrangement, are to be read as distinct codes of rules.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, sitting as Chief Judge in Bankruptcy.

Henry Aaron Hart filed a petition for liquidation by arrangement, which was agreed to by the requisite majority of his creditors on the 18th of June, 1873, and Mr. *A. S. Paterson* was appointed trustee of his estate, and two other creditors were appointed a committee of inspection.

On the 15th of December, 1873, a meeting of the creditors was called by a creditor, with the concurrence of one-fourth of the creditors who had proved their debts, under the 125th section of the *Bankruptcy Act*, 1869, and rules 305 and 307 of the *Bankruptcy*

Rules, 1870, for the purpose of removing the trustee and committee of inspection, and appointing a new trustee and a new committee of inspection. At this meeting a resolution was passed removing the former trustee and both the members of the committee of inspection, and appointing a new trustee and a new committee of inspection.

Mr. Registrar *Keene* declined to register this resolution, considering that the meeting ought to have been summoned in manner required by the 120th rule. Mr. Registrar *Brougham*, sitting as Chief Judge, reversed this decision, and referred it back to Mr. *Keene* to be registered. The original trustee and two of the creditors appealed from this decision.

Mr. *Willis Bund*, for the Appellants:—

It was irregular to summon this meeting under the 305th rule. The meetings referred to in the 304th and 305th rules are for ordinary purposes. When it is required to remove a trustee, recourse must be had to the 83rd section, sub-section 4, of the *Bankruptcy Act*, 1869, and a meeting must be summoned in the manner prescribed by rule 120. That is the meeting referred to in rule 307, and the creditors can then, under that rule, remove the trustee and appoint a new one. With respect to the removal of the committee of inspection, there is no power at all to remove them in a liquidation by arrangement, for the 307th rule does not extend to them.

Mr. *Winslow*, Q.C., and Mr. *G. N. Marcy*, for the creditors who desired the registration of the resolution, were not called on.

SIR W. M. JAMES, L.J.:—

I have no doubt in this case. There are distinct sets of rules, one for bankruptcy and one for liquidation by arrangement. In bankruptcy, according to Rule 120, a creditor who desires to remove a trustee or a member of the committee of inspection, can apply to the Court to summon a meeting; but in liquidation the conduct of the business is left more in the hands of the creditors, and a general meeting can be summoned by one-fourth in value of the creditors. The 4th and 12th sub-sections of the 83rd sec-

L. JJ. 1874 *Ex parte* HOPKINS. *In re* HART.

tion of the Act, which apply to both bankruptcy and liquidation, provide that trustees and members of the committee of inspection may be removed by a special resolution at a general meeting; and the mode of calling a general meeting in liquidation is that provided in rules 304 and 305. I think, therefore, that the Registrar was right, and the appeal must be dismissed with costs.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Mathews & Mathews;* Mr. *T. W. Payne.*

L. JJ. 1874 *April* 24.

In re CHILDS.

Bankruptcy—Joint and Separate Estates—Husband and Wife—Quasi-Partnership.

4 Ch D. 247
24 Sol. J.
6 Ch D. 249

A trader at *Brighton* married a widow who was entitled to three-fourths of the profits of a *London* business. He afterwards bought the remaining one-fourth of the *London* business, and covenanted with a trustee that three-fourths of the profits of the *London* business should be for the separate use of the wife. A resolution was duly made for liquidation of the affairs of the trader:—

Held, that the assets of the *London* business were first to be applied in payment of the creditors of the *London* business; and that only the surplus would go to the general creditors.

J. LINNEY and *T. Robinson* were partners in the business of tailors carried on in *London*. By the terms of the partnership it was to continue for twenty years from 1861; *Linney* was to contribute £6000 and *Robinson* £2000 to the capital; *Linney* was to have three-fourths of the profits, and *Robinson* was to have one-fourth, and neither was to engage in any other business; the partnership was not to be determined by the death of *Linney*, but his widow was to have three-fourths of the net profits, and his share of the capital was then to be ascertained, and the amount was to be considered as a loan to the partnership from his executors at interest, with liberty to the executors to withdraw any portion of the capital. *Linney* died in 1862. In 1867 his widow married *William Childs*. In 1869 *Childs* bought *Robinson's* in-

terest in the business; and by a deed of the 15th of July, 1869, *Childs* covenanted with one *Hogg*, as trustee for Mrs. *Childs*, that the three-fourths of the profits of the business and all the share and interest of *Childs*, to which Mrs. *Childs*, or *Childs* in her right, was entitled, should be for the sole and separate use of Mrs. *Childs*, and Mrs. *Childs* and her husband were to have respectively the same rights and obligations as those conferred on *Linney & Robinson* by the original deed of partnership, except that *Childs* was to be at liberty to carry on any other business. These arrangements were made under an order of the Court in a suit for the administration of *Linney's* estate.

It appeared that *Childs* had for many years carried on the business of a toy-dealer at *Brighton*, and was indebted to several persons in respect of that business, wholly unconnected with the *London* business. On the 6th of May, 1873, he filed a petition, on which a resolution for liquidation of his affairs by arrangement was made, and inspectors were appointed.

The creditors of the *London* business applied to have the assets of the *London* business applied first in payment of their debts. There was evidence that the two businesses were entirely separate.

Mr. Registrar *Murray* decided that the assets of the *London* business were to be treated as joint estate, and to be applied in payment of the creditors of that business in priority to the *Brighton* creditors, who were to be treated as separate creditors.

Two of the inspectors and one of the general creditors appealed.

Mr. *Roxburgh*, Q.C., and Mr. *Bagley*, for the Appellants:—

The question is, whether a man who carries on one business in *London* and another business at *Brighton* can divide the assets as if there were two firms. The moment *Childs* married *Linney's* widow all her interest in the profits became his, and he then bought the rest of the business, and thus got the whole. No one else could have been sued for a debt, and as regards him there is but one estate. Any one who had recovered judgment against him could resort to the assets of either business. There has never been a case in which separate firms have been recognised, unless there were other partners. There is no evidence that the stock and assets of the *London* business are the same as they were when

L. JJ. 1874 *In re* CHILDS.

the debts were contracted, so as to give the *London* creditors any lien.

Mr. *De Gex*, Q.C., and Mr. *F. Knight*, for the *London* creditors, were not called upon.

Mr. *Eddis*, Q.C., Mr. *Winslow*, Q.C., Mr. *Woodroffe*, and Mr. *Davey*, for other parties.

SIR W. M. JAMES, L.J., said that this appeared to be a very simple case. The settlement made in 1869 was not morally wrong, and no case had been made to impeach it.

The widow of Mr. *Linney* had a right to a large share in his business, and she married a man who was in business elsewhere. The other partner in her former husband's business was then got rid of, and the husband thus became entitled to one-fourth of the business. He thereupon stipulated that he would keep the business so that his wife should have three-fourths of the profits. In fact it became a trust estate affected by trusts in favour of the wife. His position was then the same as that of an executor carrying on business in one place for himself, and in another place as executor of some one else. The estates would then be separate, and the creditors of each would be separate, and the same principle must apply here. It was only an application of a general rule in equity, from which the whole principle of joint creditors and separate creditors arose. In fact it was very like the principle adopted in *Ex parte Waring* (1). The Registrar was quite right, and there was no other mode of doing justice. The general creditors must resort to the other assets; but of course if there was any surplus from the *London* business, *Child's* share of it would go to the general creditors. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J., said that he was entirely of the same opinion.

Solicitors for the Appellants: Messrs. *Lawrance, Plews, & Boyer.*

Solicitors for the Respondents: Messrs. *Robinson & Preston*; Messrs. *Halse, Trustram, & Co.*

(1) 19 Ves. 345.

In re LIVERPOOL CIVIL SERVICE ASSOCIATION. *Ex parte* GREENWOOD.

L. JJ. 1874 April 28.

Winding-up—Payment of Part of Debt—Re-payment—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 80, 153.

A creditor presented a petition for winding up a company. The company paid a part of the debt, and promised to pay the remainder on a certain day. This was not done, and the creditor proceeded with his petition, and a winding-up order was made upon that petition and another petition:—

Held, that the creditor must pay back the money paid to him.

Order of the Palatine Court affirmed.

H. GREENWOOD, a creditor of the *Liverpool Civil Service Association* for £208, served on the association a demand for payment, and not having been paid he presented a petition for winding-up the association. The association then paid him £100, and undertook to pay by a certain day the balance of his claim. The association afterwards presented a petition to wind up, and an order to wind up was made upon both petitions. The Court of the County Palatine of *Lancaster*, on the application of the official liquidator, made an order that *Greenwood* should pay back the £100. *Greenwood* appealed.

Mr. *North*, for the Appellant:—

Any creditor who is not paid can present a petition for winding up a company, and that is a legitimate mode of compelling payment. If the association had paid the whole of the debt, the creditor would have kept the money, and could not on account of any winding-up, be compelled to pay it back; then why is he to pay back anything because he received a part only, and gave time to the association in which they might save themselves? If such a payment is invalid, then the moment a petition has been presented, however good a defence a company might have to it, they could not venture to pay any one, not even their clerks, for fear of having the payment declared illegal. The Court does not interfere with *bonâ fide* transactions: *In re Wiltshire Iron Company* (1); *In re International Life Assurance Society* (2).

(1) Law Rep. 3 Ch. 443. (2) Law Rep. 10 Eq. 312.

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Mr. *W. F. Robinson*, and Mr. *F. Thompson*, for the official liquidator, were not called upon.

SIR G. MELLISH, L.J :—

This raises a question of some importance, which appears to me never to have been directly decided, that is, whether, where a joint stock company is unable to pay a creditor, and the creditor serves, under the 80th section of the Act of 1862, a demand for payment, and then not getting paid within three weeks presents his petition to wind up the company, and then, by a *bonâ fide* agreement with the company, receives a payment on account, with a promise to pay the balance, which promise is not afterwards performed, and the petition goes on and an order is made to wind up the company upon that petition, the Court ought, under the 153rd section, to allow the transaction to stand, or ought to compel the creditor to bring into Court the money already received by him, so that he may obtain out of the assets of the company only his share in respect of his debt.

Now, I think there can be no doubt that under the 153rd section, this is purely a matter for the discretion of the Court, and that the payment of this £100 to *Greenwood* is to be void, unless the Court should otherwise order.

I do not mean to express any dissatisfaction with the cases which have been cited by Mr. *North*, as deciding that all *bonâ fide* transactions in carrying on the ordinary business of a company, which take place between the petition and the winding-up order, and have been completed before the winding-up order is made, should be confirmed. But here the question is, whether the very creditor who has prosecuted the petition should be allowed to retain money which he has obtained by means of the petition, when the result of the petition is that the assets of the company are to be divided equally amongst its creditors.

It appears to me that it would be contrary to sound principle, and to the principle which has always prevailed in bankruptcy, if that were to be allowed. A company is, according to the 79th section, to be wound up whenever the company is unable to pay its debts, and then the 80th section says, that a company under this Act shall be deemed to be unable to pay its debts whenever a creditor has served his demand for a sum above £50, and has

not been paid within a period of three weeks. That happened in this case, and then the creditor presented his petition, asserting that the company was unable to pay its debts. If he had received payment, and had given up his petition, that, in my opinion, would have been a totally different thing. So, too, if the company had performed their promise, and had paid the whole of his debt, and then he had withdrawn his petition, that also would be a different thing. Neither of these events, however, has taken place; but the creditor insists on the Court making a winding-up order on the ground that at the time when he presented his petition the company was unable to pay its debts, and therefore ought to be wound up, and that the assets ought to be divided amongst the creditors. It appears to me that a creditor of this kind avers that he is willing to come in and take an equal share with all the other creditors, and that he should not be allowed to take advantage of the Act, and get payment on the ground that the company is unable to pay its debts, and at the same time receive a greater proportion than the other creditors. In all bankruptcies and winding-up proceedings a creditor who successfully avails himself of those proceedings cannot be allowed to receive more than his share of the assets, and must come in equally with all the other creditors.

I think, therefore, that the order must be affirmed, and the appeal dismissed with costs.

SIR W. M. JAMES, L.J., concurred.

Solicitor for the Appellant: Mr. *W. W. Wynne.*
Solicitor for the Official Liquidator: Mr. *I. H. E. Gill, Liverpool.*

L. J. J. 1874 April 29.

COTTERELL *v.* STRATTON.

[1868 C. 141.]

Costs—Lower Scale—Mortgage—Amount of Debt.

A mortgagor received an advance of £900 from a building society, and conveyed to the society property to secure the payment by him of £900 and interest in 120 instalments (amounting together to £1275), and also of certain fines and charges in the event of his failing to pay the instalments. A decree for redemption was made, the costs of the suit to be added to the security :—

Held, that as the sum originally advanced was less than £1000, the costs must be taxed on the lower scale, and that the fines and charges which might be incurred could not for this purpose be considered as added to the sum advanced; but:

Held, that the scale of taxation was not dependent on the amount due when the bill was filed.

Order of *Malins*, V.C., affirmed.

JAMES COTTERELL in 1858 borrowed from a building society the sum of £900, and mortgaged to the trustees of the society certain leasehold houses to secure the payment of 120 monthly instalments of £10 12*s.* 6*d.* each (amounting to £1275, the calculated amount of £900 with interest for the time), and also the payment of all fines and sums of money which, by the rules of the society, might become payable. *Cotterell* made default in payment of the instalments, and incurred fines, some of which were of £3 a month, and in 1861 the society took possession. In 1868, *Cotterell* filed the bill in this suit to redeem; a decree was made for an account, and £517 was found to have been, at the time when the bill was filed, due upon the security, the society having claimed £736. An order for redemption was made on further consideration, the costs of the suit to be added to the security; as reported (1).

The Taxing Master taxed the costs according to the lower scale; and the Vice-Chancellor *Malins*, on the ground that the amount due when the bill was filed was under £1000, refused to direct the Master to review his taxation; as reported (2).

The Defendants appealed.

(1) Law Rep. 8 Ch. 295. (2) Law Rep. 17 Eq. 543.

Mr. *Cotton*, Q.C., and Mr. *H. J. M. Williams* for the Appellants:—

By the Regulations of Hilary Term, 1860 (1), solicitors must charge on the lower scale in all suits for foreclosure or redemption in which the mortgage whereon the suit is founded shall be under the amount of £1000. But here, though the sum advanced was £900, the mortgage was to secure £1275. Moreover, the mortgage was to secure fines which might, and, in fact, did become payable to an amount much above £100, so making the sum secured above £1000. The addition of these sums and of the costs of the suit is the mortgagor's own fault, and he ought not to be allowed to escape the consequences: *Earl of Stamford* v. *Dawson* (2); *Grimes* v. *Harrison* (3). The sum found due at the time when the bill is filed can be no test, as the mortgage may have been for a very large sum, and the amounts in dispute may have been very large.

Mr. *Bristowe*, Q.C., and Mr. *T. A. Roberts*, for the Plaintiff:—

The sum secured by the mortgage is merely the £900, and the amount of interest calculated according to the time of payment. The test is, whether the sum in dispute is under £1000, and the mortgagees did not even claim more than £736. If in an administration suit the estate should turn out to be under £1000, the lower scale has been held to apply, unless there has been fraud: *Judd* v. *Plum* (4); *In re Reece's Estate* (5); *Gibbs* v. *Gibbs* (6); *Reade* v. *Bentley* (7); *Flockton* v. *Peake* (8).

Mr. *Cotton*, in reply, admitted that the interest could not be taken into account, but argued that the fines raised the amount to more than £1000.

SIR W. M. JAMES, L.J.:—

It appears to me also that the order of the Taxing Master in

(1) Morgan's Ch. Acts and Orders, 4th Ed. App. xxxiii.
(2) Law Rep. 4 Eq. 352.
(3) 27 Beav. 198.
(4) 29 Beav. 21.
(5) Law Rep. 2 Eq. 609.
(6) 27 L. J. (Ch.) 577.
(7) 3 K. & J. 271.
(8) 12 W. R. 1023.

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this case is right, though I cannot concur in the reasons by which the Vice-Chancellor arrived at that conclusion.

In this particular form of suit, the amount due, or alleged to be due, at the time of instituting the suit, cannot be the true criterion to determine the scale. Where a mortgagor has borrowed on mortgage a sum greater than £1000 and files a bill for redemption, it is clear that his costs cannot be reduced to the lower scale, even if the whole sum had been repaid before the suit was begun.

For, suppose that the mortgagor has tendered more than the whole sum due at the time, and the result was that he was entitled to redemption without paying any thing except the sum due, surely then he would not have his costs taxed on the lower scale. In such a case the suit would be not to enforce or resist any lien, but to get back the property. There might, if it was a suit by an equitable mortgagee, be some difficulty on the construction of the words in saying whether the amount was to be the sum due at the time of the deposit or at the time when the lien was sought to be enforced, and probably the rule would have reference to the amount sought to be charged, but that is not the case here.

The question is, what is the suit founded on? This suit is founded upon a mortgage on an advance of £900, and the security is for £900 and interest and fines. It is admitted that we cannot take into consideration the amount of interest, though the payment may be postponed for several years. We cannot add that sum to the principal, and say that the mortgage was to secure a sum made up of the principal and the amount of interest in arrear.

Then it was said that the mortgage was to secure not only principal and interest, but also what were called fines; that is, sums which the society was entitled to under its regulations, in addition to principal and interest, and I think also commission, and something besides. But are these fines and charges anything more than the common charges to which a mortgagee has in every case a right? He is or may be entitled to institute a suit against the mortgagor, and he can then add those costs to his security. He may be obliged to defend the title, and he may have to pay ground rents or insurance, and the cost of all these things he may add to the charge, as they are all collateral incidents to his

security. And I am of opinion that there is no difference between these charges and what are here called fines.

When we consider what was the origin of these rules, it is obvious that there may be as much litigation and dishonesty in small as in large transactions, and quite as much difficulty in ascertaining what are the rights of the parties. But it is in accordance with the common feelings of mankind that we should not and ought not to impose the same amount of costs in small as in large transactions; and it was no doubt considered that where the subject-matter of the suit is small, the costs should be on a smaller scale, and that where the property in dispute is small, solicitors and others employed should accept less for their services. It was felt to be a shocking thing that, where a mortgage was for £500, and some question between the mortgagor and mortgagee arose, the suit for the purpose of ascertaining their rights should be conducted on the same luxurious scale as if the question concerned a mortgage for a much larger sum. To effect this purpose some rule must be made, and £1000 was taken as the sum at which to draw the line; so that if the sum is less, the litigation must be conducted on a more economical scale. Here the mortgage was for less than £1000, and the rest of the sums charged were only for the purpose of securing the payment of that sum. The appeal must be dismissed with costs.

I ought to say that I am quite unable to follow the principles of some of the cases, or to see how the amount of assets forthcoming can affect the question.

Solicitor for the Plaintiff: Mr. *H. Dinn.*

Solicitors for the Defendants: Messrs. *Wyatt, Hoskins, & Hooker.*

L. J. J. 1874 April 29.

MARZIALS *v.* GIBBONS.

[1874 M. 92.]

Copyright—Extended Term—Author—Owner—Trustee—5 & 6 Vict. c. 45, s. 4.

Seven persons, acting under the direction of trustees for a charity, compiled a book, which was registered in their names, but was published by and for the profit of the charity:—

Held, that the executor of the survivor of the seven compilers, had not obtained the benefit of the extended term of copyright granted by 5 & 6 Vict. c. 45, s. 4.

Order of the Master of the Rolls affirmed.

THE Wesleyan Conference is a body consisting of 100 members, and is the governing body of the *Wesleyan Society*. For many years past the Conference has published and sold religious books, the profits of which are at the disposal of the Conference for religious or charitable purposes. In 1831 seven persons acting as a committee of the Conference compiled a book called "A Collection of Hymns for the use of the people called Methodists," which was published by *John Mason*, then holding an office called "Book-steward to the Conference," and being one of the seven compilers. The book was, on the 15th of September, 1831, duly registered by *John Mason* as the property of the seven compilers. It was not known that the compilers were ever paid anything for their labour, but they acted under the instructions of the Conference, and the Conference had always received the profits of the book, which were very considerable.

The Defendants, *W. Gibbons* and *John Haddon*, had recently published a cheaper edition of the hymn book; and *T. P. Marzials*, the executor of the will of *Thomas Jackson*, who was the survivor of the seven compilers and died in 1873, filed the bill in this suit to restrain the publication.

The Plaintiff moved for an injunction, which was refused by the Master of the Rolls.

The Plaintiff now renewed the motion by way of appeal.

Mr. *Fry*, Q.C., and Mr. *Bunting*, for the Plaintiff:—

The case depends entirely upon the question, whether the

Plaintiff has, under 5 & 6 Vict. c. 45 (1), the copyright in the book. Under the statute 8 Anne, c. 19, the Plaintiff would have been the owner of the copyright, and we say that all such copyrights were extended by the later statute. It is true that the Wesleyan Conference are the real owners, but the Plaintiff is the legal owner, and equitable interests are never registered. No doubt the consent required by the statute might have been obtained, and a minute might have been entered, but by a mere slip and accident this was not done.

Mr. *Southgate*, Q.C., and Mr. *Millar*, for the Defendants, were not called upon.

SIR W. M. JAMES, L.J.:—

I am afraid that I must come to the same conclusion as the Master of the Rolls has come to, and with the same regret as he expressed.

(1) 5 & 6 Vict. c. 45, recites that it is expedient to afford greater encouragement to the production of literary works of lasting benefit to the world. By sect. 3 the copyright in every book to be published after the passing of the Act shall endure for the natural life of the author, and for the further term of seven years, or in any case for forty-two years.

Section 4 is as follows: "And whereas it is just to extend the benefits of this Act to authors of books published before the passing thereof, and in which copyright still subsists, be it enacted, that the copyright which at the time of passing this Act shall subsist in any book theretofore published (except as hereinafter mentioned) shall be extended and endure for the full term provided by this Act in cases of books thereafter published, and shall be the property of the person who at the time of passing of this Act shall be the proprietor of such copyright: provided always that in all cases in which such copyright shall belong in whole or in part to a publisher or other person who shall have acquired it for other consideration than that of natural love and affection, such copyright shall not be extended by this Act, but shall endure for the term which shall subsist therein at the time of passing of this Act, and no longer, unless the author of such book, if he shall be living, or the personal representative of such author, if he shall be dead, and the proprietor of such copyright, shall, before the expiration of such term, consent and agree to accept the benefits of this Act in respect of such book, and shall cause a minute of such consent in the form in that behalf given in the schedule to this Act annexed to be entered in the book of registry hereinafter directed to be kept, in which case such copyright shall endure for the full term by this Act provided in cases of books to be published after the passing of this Act, and shall be the property of such person or persons as in such minute shall be expressed."

L. J. J. 1874 MARZIALS v. GIBBONS.

It is not easy to see why the Wesleyan body should not have the benefit of this Act as well as any other owner of a copyright. But the object of this Act was, first of all, to afford greater encouragement to the production of literary works of lasting benefit to the world, and for that purpose it was enacted that the copyright of works thenceforth to come into existence should be of much longer duration than had been the case theretofore. Then the Legislature had to deal with the case of existing copyrights, as to which the third section would not apply; and the Legislature must be understood to have said, "It is quite right that the authors of books in which there shall be an existing copyright, or the personal representatives of authors who shall be deceased, should have the same benefit, but it must be a personal benefit to the author, and not to any person other than the author or his representatives, because it is to be a reward for the production of literary works of lasting benefit to the world."

Now in this case the copyright had not in terms passed out of the original owners—that is to say, the only original legal owners —and would be, according to the argument of Mr. *Fry*, the property of the Plaintiff as the legal personal representative of the last of the seven persons who were the original compilers. If it was not his property at the time of the passing of the Act, the Act could not have given him the further extension which was provided for him. It was essential to his title to make out that he was the proprietor of the copyright at that time. But was he the proprietor of the whole of it? because the words are, "Provided always that in all cases in which such copyright shall belong, in whole or in part, to a publisher or other person who shall have acquired it for other consideration than that of natural love and affection, such copyright shall not be extended by this Act."

In my opinion it did not belong to him at all, and therefore it did not belong wholly or in part to him.

Then it is said, with some plausibility, taking the argument which was addressed to me by Mr. *Bunting*, that there is no person to whom it belongs, as it was from the first devoted to a charity. But I do not think that that argument will really avail him; because the meaning of those words is, that where the author is not sole and absolute owner, or has not given the copyright for

natural love and affection, in those cases the Act shall not apply, unless the author, having regard to his own benefit or his own views upon the subject, shall, before the expiration of the existing copyright, have entered into an agreement with the then owner.

That, however, was not done. The real owner is not the author. The Plaintiff does not pretend to have the slightest beneficial interest in the matter, and there has been no minute of any kind entered at the proper registry of any agreement between the authors and the beneficial owners of the copyright.

It appears to me that the words of the statute are too strong to be got over. Of course, such a case as this was never contemplated by the Legislature, and was never thought of by the *Wesleyan Society;* otherwise they might have got over the difficulty by treating the Conference, or some other person on behalf of the Conference, as the beneficial owner, as they might probably be treated for the purposes of this Act. But having regard to the words of this 4th section, I am of opinion that the order of the Master of the Rolls was right, and that the appeal motion must be refused with costs.

Solicitors for the Plaintiff: Messrs. *Walker & Battiscombe.*
Solicitors for the Defendants: Messrs. *Watson & Sons.*

L. C.
and L. JJ.

1874

April 22.

ANDREW *v.* RAEBURN.

[1874 A. 22.]

Practice—Hearing in Camerâ—Suit to restrain Publication of Private Letters.

4 Ch D. 174

It is contrary to the practice of the Court to hear causes in private without the consent of both parties, except in cases which affect lunatics or wards of Court.

But whether the Court would not hear a cause in private without the consent of one of the parties, if the whole object of the suit would be defeated by a hearing in public, *quære.*

THIS was an appeal from an order of Vice-Chancellor *Bacon.* The suit was instituted for the purpose of restraining the Defendant from printing, publishing, or parting with certain letters and copies of letters, or from divulging the contents thereof.

The documents in question consisted of thirty-four letters and copies of letters which passed between one or other of the Plaintiffs and a third party, and five letters and copies of letters which passed between the Defendant and a third party. The Vice-Chancellor granted an interlocutory injunction restraining the publication of any of the letters till the hearing, on which occasion he heard the argument in private, on the application of the Plaintiffs, but against the wishes of the Defendant. From this decision the Defendant appealed.

Mr. *Kay,* Q.C., and Mr. *W. F. Robinson,* for the Plaintiffs, asked that the appeal might also be heard in private, on the ground that the matter could not be properly argued without referring to the contents of the letters, and that if they were read, the whole object of the suit would be defeated. The Divorce Court constantly exercised the discretion of hearing cases *in camerâ,* where public morality would be outraged by a public hearing: *H.*—— v. *C.*—— (1); *Barnett* v. *Barnett* (2). And the Court of Chancery had the same discretion, and would exercise it, whether both parties consented or not, in a proper case: *Ogle* v. *Brandling* (3); *In re Lord Portsmouth* (4).

(1) 29 L. J. (P. & D.) 29.
(2) Ibid. 28.
(3) 2 Russ. & My. 688.
(4) Coop. G. 106.

SIR W. M. JAMES, L.J.:—In cases where wards of Court and lunatics are concerned, the Court exercises its discretion without the consent of the parties. Are there any instances of this being done in other cases?

Mr. *Swanston*, Q.C., and Mr. *Whitehorne*, for the Defendant, declined to give their consent to a private hearing; but they were willing to give an undertaking not to refer to the contents of the letters if the case were heard in public. The question at issue on this appeal was as to the right to restrain the publication of such of the letters as were not written by the Plaintiffs, and was quite independent of the nature and contents of the letters.

LORD CAIRNS, L.C.:—

If it had appeared to me that this was a case in which a hearing in public would cause an entire destruction of the whole matter in dispute, I should have taken time to consider whether it was consistent with the practice of the Court to hear it in private even without the consent of both parties, in order to prevent such entire destruction of the matter in dispute. But from the nature of this case it appears to me impossible to say that the subject of the suit would be destroyed by a public hearing. If the argument could not be conducted without reading the letters it might probably defeat the object of the suit to hear it in public. But it is clear that it may be argued without their being read, possibly even without the Court seeing them. But if necessary they may be handed up to the Court. Mr. *Swanston* assures us that he does not intend to read any of them, and if Mr. *Kay* finds it necessary that the Court should know their contents, he can hand them up to the Court. Under these circumstances I do not think it would be right to deviate from what is undoubtedly the practice of the Court—not to hear a case in private except with the consent of both parties.

SIR W. M. JAMES, L.J.:—

I am entirely of the same opinion. If I thought that a public hearing could have the effect of making public what it is the

L. C. and L. JJ. 1874 ANDREW v. RAEBURN.

whole object of the suit to keep secret, I should have felt a difficulty in refusing to allow this appeal to be heard in private. But as Mr. *Swanston* says that he does not intend to read any of the letters, there is no occasion to depart from the practice of the Court.

SIR G. MELLISH, L.J., concurred (1).

Solicitors for the Plaintiffs: Messrs. *Hollams, Son, & Coward.*
Solicitors for the Defendant: Messrs. *Lewis, Munns, & Longden.*

(1) The appeal was afterwards heard by the Lords Justices, who affirmed the order of the Vice-Chancellor, on the ground that if they discharged it they would be in fact determining the whole question in the suit before the hearing.

GREAT WESTERN INSURANCE COMPANY *v.* CUNLIFFE.

L. JJ.
1874
April 20, 21.

[1869 G. 98.]

Agent—Commission from other side—Charges—Insurance—Negligence—Remedy at Law.

A marine insurance company in *New York* appointed a firm of merchants in *London* their agents for settling claims in *England* and for effecting re-insurances. For settling the claims the agents were to receive a fixed percentage, but nothing was provided as to remuneration for re-insuring. According to the custom as between underwriters and brokers, the agents were allowed by the underwriters 5 per cent. on each re-insurance; and also at the end of the year, on the general balance between the underwriter and the broker, 12 per cent. on the profits of the year, if there were profits. The firm in *London* were in the habit of receiving both these percentages, but only the 5 per cent. was mentioned in their accounts sent to the insurance company. The company discovered this in 1866, but made no objection to it until 1868. In 1869 the company filed a bill against the firm in *London* for an account in which the 12 per cent. should be accounted for; claiming also repayment of certain sums as interest; and praying that the firm in *London* might in the account be held liable for neglect in not re-insuring a certain vessel:—

Held, that under the circumstances the firm in *London* were entitled to retain the 12 per cent. received by them as remuneration; and were also entitled to the interest charged by them:

Held, further, that the loss sustained by the alleged neglect of the firm in *London* could only be recovered at law; and that the bill must therefore be dismissed.

Decree of *Bacon*, V.C., reversed.

THE bill in this case was filed by the *Great Western Insurance Company*, a marine insurance company at *New York*, against Mr. *John C. Pickersgill Cunliffe* and Mr. *W. C. Pickersgill*, as representing the firm of *Pickersgill & Son*, merchants in *London*, formerly agents for the company, charging them with negligence, and with making charges improperly, and praying for an account.

In June, 1858, Mr. *Lathers*, the president of the *Great Western Insurance Company*, wrote to Messrs. *Pickersgill & Son*, stating that the company proposed to make some of its policies, on cargoes of cotton and other produce destined for *Europe*, adjustable and payable by an agent in *London* or *Liverpool* in case of loss or claim, and that the object of this letter was to ascertain if such an ap-

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pointment would be agreeable to Messrs. *Pickersgill & Son*, and what compensation they would expect for such service.

To this Messrs. *Pickersgill & Son* answered that they would have much pleasure in undertaking the agency for settling and paying claims, on the usual terms, say $2\frac{1}{2}$ per cent. on the amount paid.

The president acknowledged the receipt of this letter, and wrote again, giving directions as to the books to be kept, so as to give the company the benefit of the prompt and efficient attention of Messrs. *Pickersgill & Son* in each case. And he proceeded to say, "Of course the company will expect to pay you for all disbursements of this character which you may deem it judicious to make to protect its interest in any way. And perhaps it would be well for you to employ an intelligent clerk at a moderate salary, and set apart a special desk for his use at the expense of the company, as, with your permission, we shall frequently have re-insurance and other business negotiations to make through you. Our southern cotton business is very large and increasing, and often requires heavy re-insurances on cargoes by British vessels which we cannot always get covered here. We are compelled to take these large amounts as they come under our numerous open policies. Indeed we often have excessive lines from *East India* and other distant ports falling under open policies which cover bankers' credits. Is it practicable to get them re-insured with your underwriters? Could I rely on being able to place from $50,000 to $100,000 through you at any time, current rates?"

Messrs. *Pickersgill* in answer said, "With regard to re-insurances we do not anticipate any great difficulty in effecting at *Lloyd's* any you may have, at the current rates and on the conditions usual at that establishment, provided that there is nothing very unusual or extraordinary in the risks, and that you give us instructions to re-insure as early as practicable."

Many other letters passed between the parties, several as to the time when interest was to be charged on the premiums paid.

The agency began and was continued on these terms until 1863, when a new agreement, dated the 26th of June, was entered into between the parties. The material portions were as follows:—

"Whereas the said *Great Western Insurance Company* of *New*

York are desirous of appointing agents in this country to take risks on their behalf, and to issue policies to the parties in respect of the risks so taken, and the said firm of *John Pickersgill & Son* have agreed to accept such agency, and the parties have agreed to enter into the stipulations hereinafter contained,

"Now these presents witness, and the said parties hereto do hereby mutually promise and agree to and with each other in manner following, that is to say:—

"That the said firm of Messrs. *John Pickersgill & Son* shall become and be the exclusive agents of the *Great Western Insurance Company* in *London*, for the purpose of taking risks upon ships, or freights, or upon goods, wares, or merchandises, or bottomry, or *respondentia* interests, either for time or for any voyage or voyages, and the said firm shall also act as such agents for the purpose of investigating, and settling, and adjusting and paying all claims that may arise upon such policies, or any of them, and of resisting any claim or claims upon such policies which the said *John Pickersgill & Son* may consider ought not to be paid; nevertheless the said *John Pickersgill & Son* shall conduct the business under the direction of the *Great Western Insurance Company* and subject to such written instructions as they may receive from time to time from the said company in regard to the conduct of the said agency."

The agreement then contained provisions as to the books to be kept, and the interest to be charged, and the discretion to be left to Messrs. *Pickersgill*, and proceeded:—

"The remuneration to the said firm of *John Pickersgill & Son*, for conducting the business as such agents, shall be as follows:—A commission of 5 per cent. upon the premiums made in each and every year during the continuance of this agreement. These commissions to be calculated upon the premiums, after deducting therefrom the discount allowed to the assured, and the usual brokerage of £5 per cent. paid or allowed to the broker; but in the event of any premiums being lost the commission upon such premiums is to be calculated upon the net amount, after deducting the brokerage and discount that would have been allowed had such premiums been duly paid at maturity

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"The above commissions are to include all charges for settling, adjusting, and paying losses, averages, or returns on policies issued in *London*, and for the payment of losses on policies issued at *Liverpool*. Where, by the terms of such policies, when issued, it is stipulated that the payment of any claim thereunder shall be made in *London* by the said *John Pickersgill & Son*, the said *John Pickersgill & Son* shall make no charge for paying the same."

The agency under the last-mentioned agreement continued until some time in May, 1866, when it was discontinued; and the original agency was continued until the 1st of April, 1868.

Meanwhile, on the 11th of November, 1865, *John Pickersgill*, the father and senior partner, died. The business was continued by his son, Mr. *J. C. Pickersgill Cunliffe*, alone; but he and his brother *William Cunliffe Pickersgill* were executors of the father.

The bill was filed in 1869 against Mr. *J. C. P. Cunliffe* and Mr. *W. C. Pickersgill*, and in asking for an account raised three causes of complaint; the first was for not re-insuring a vessel called the *Roger A. Hiern*, the facts respecting which were these:

On the 24th of November, 1865, the secretary of the company wrote to Messrs. *Pickersgill* as follows:—

"I find you report as having taken £3245 per barque *Robert*, *New Orleans* to *Liverpool*. As our line by this vessel was already full, please re-issue the warrant you have taken; and, in order to prevent a like occurrence in future, we will furnish you weekly lists of vessels sailing from *Gulf* ports to *Europe* upon which we have full lines, that you may decline risks offered upon vessels thus reported. Annexed please find a list of vessels from *Gulf* ports upon which we are already full; and should you have taken any risks upon them, you will please re-insure." . . . .

Annexed to this letter was a list of thirty-seven vessels, amongst which was the *Roger A. Hiern*, sailing from *Mobile* to *Liverpool*, on which vessel Messrs. *Pickersgill* had taken an insurance for £3500. After attempting to re-insure they wrote to the company that "in consequence of the recent numerous and heavy losses on cotton in the *Gulf* there was almost a panic amongst many of the underwriters on this side, and therefore we could not re-insure as you wish, except at extraordinary (and what we considered exces-

sive) rates [if even then], especially as some of the vessels sailed about the time of the hurricane. We therefore think it better to inclose you a list of the vessels not arrived on which we have taken lines, and leave you, if you deem it necessary, to effect re-insurance on your side. If we remember rightly, you stated, when here, that these risks were freely taken in *New York* at 1½ per cent., which will enable you to re-insure at a considerable profit, whereas we should have to do so at a loss."

This letter was received about the 21st of December. In the meantime, on the 19th of December, 1865, the ship *Roger A. Hiern* was stranded off *Mobile*, whereupon the risk taken by Messrs. *Pickersgill* on behalf of the company was converted into a loss of £3500.

The company complained of this loss, and said that it was the duty of Messrs. *Pickersgill*, as agents, to insure when directed to do so. Messrs. *Pickersgill* answered that they had done their best, and that their great anxiety was to save the company from the loss by the exorbitant rates they would have had to pay; and other correspondence passed between them on the subject.

The second cause of complaint was that Messrs. *Pickersgill & Son* had charged interest in a manner which the Plaintiffs thought wrong. This complaint involved no question of law, and the judgments of their Lordships contain sufficient statements of the facts.

The third cause of complaint was, that in their accounts Messrs. *Pickersgill* had not charged themselves with and had retained a certain allowance of 12 per cent. made to them by underwriters.

As to this it appeared that there were two systems of insurance between brokers and underwriters: the cash system and the credit system. On the credit system, which was, at the request of the company, adopted by Messrs. *Pickersgill & Son*, the broker is debited with the premium, and credited with 5 per cent. for brokerage in his account with the underwriter, upon the insurance being effected. The account is continued up to the 31st of December in each year, and in this account the underwriter is debited with the losses which have arisen upon the risks protected by insurances; and if upon the balance of the account the

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amount of the premiums, less brokerage, exceeds the amount of the losses, so that the underwriter has money to receive, the underwriter allows to the broker a reduction of 12 per cent. upon the balance which the broker pays to the underwriter. On the other hand, if the losses exceed the premiums, less brokerage, the broker does not receive any allowance upon the amount of the premiums which he pays in account. This deduction or allowance of 12 per cent. is called discount.

Messrs. *Pickersgill* had retained both the 5 per cent. and the 12 per cent. The 5 per cent. appeared in their accounts, but the 12 per cent. did not appear, and according to the Plaintiffs, not until 1866, when the vice-president of the company was in *England,* was it discovered that the firm were obtaining the brokerage of 12 per cent. from the underwriters. The Defendants alleged that the so-called discount of 12 per cent. was an optional payment on the part of the underwriter, and that it could not be enforced as a legal claim. It was calculated upon the eventual balance, if any, upon the account between them, of premiums over losses appearing at the end of the year, and was, in fact, a gratuity to the broker to induce him to bring a profitable class of business to the underwriter. They further stated that the re-insurances were effected by them in their own names, and on their own responsibility, as the underwriter on this side would not give credit to a foreign company, and both the premiums and losses were carried to the account of the firm by the underwriters, and not to the account of the company, to whom the underwriters were strangers. The Defendants also denied that this 12 per cent. was received by them as agents of the Plaintiffs, for that Messrs. *Pickersgill* never were the agents of the Plaintiffs for the purpose of re-insurance, and simply executed their orders as brokers.

The Defendants in their answer further pleaded that the remedy of the Plaintiffs was at law, and claimed the same benefit as if they had demurred.

A considerable amount of evidence was adduced, especially as to the alleged neglect to re-insure, and the difficulty of re-insuring the *Roger A. Hiern.*

The Vice-Chancellor *Bacon* made a decree for an account, de-

ciding in favour of the Plaintiffs' contentions on all the points in dispute (1).

The Defendants appealed.

(1) 1874. Feb. 18. WN(1874)48

SIR JAMES BACON, V.C., after stating the facts of the case, and reading the letters and the agreement between the company and Messrs. *Pickersgill*, said that it seemed to him impossible to deny, after reading those letters, and having regard, moreover, to the subsequent transactions between the Plaintiffs and Messrs. *Pickersgill*, that an agency in the full sense of the term had been undertaken by Messrs. *Pickersgill*. It also seemed to him impossible to doubt that Messrs. *Pickersgill* did undertake from the beginning the business of re-insurance as well as what other business might be committed to them by their correspondents in *New York*, and that it was a mistake to call them brokers. It had been convenient for the Defendants to conduct the argument as if they had been insurance brokers; but they were not, as far as His Honour knew, properly called by that name in any instance. They were not brokers; they were described in the bill as being merchants; they were addressed as merchants; they admitted in their answer that they were merchants, and in the character of merchants, acting as agents for persons in a foreign country, but in their name, and on their behalf, they effected insurances at *Lloyd's*, not *quâ* brokers—they were not brokers—they were not, as in other cases, agents both for the underwriters and the persons insuring. It was a mistake altogether, a fallacy which had pervaded the greater part of the argument on behalf of the Defendants, to treat Messrs. *Pickersgill* as ever having been in any sense insurance brokers. If the company at *New York* had been here resident and had desired to re-insure, they would have gone to *Lloyd's* and have effected the insurances; they would want no broker for that purpose, they would go in their own persons and effect the re-insurances. Brokers might be usefully employed in a variety of transactions relating to insurances and re-insurances; but a shipping broker or an insurance broker had no place in such a case as this. It was, in short, an agency in its full terms, that is to say, it was doing by a hand here that which the hand in *America* was not large enough to reach to this country to do for itself; it is done for him and in a sense by him.

Then what was re-insurance? An insurance company was practically bound to accept any insurance that was offered to it for whatever amount, provided there was no other objection; but as according to the constitution of most companies there was a limit beyond which they would not pledge the liability of the company, they, when the sum was too large, re-insured; that is to say, they effected an insurance with another office, or some other person, for some part of the sum they had taken. That in common parlance was called re-insurance, though not with very perfect accuracy so called. The honesty and the propriety of it could not be questioned.

His Honour then stated the facts as to the insurance on the *Roger A. Hiern*, and proceeded to say that one of the questions in the cause was whether there had been such neglect on the part of the Messrs. *Pickersgill* in not re-insuring a certain ship as justified the Plaintiffs in seeking to be reimbursed for the consequence of that neglect. It

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Mr. *J. Pearson*, Q.C., and Mr. *Millar*, for the Appellants:—

As to the sum retained by us as discount, it is always the custom to make this allowance when there has been a profit: *Xenos* v. *Wickham* (1). We had the same right to that allowance as we might be that if that was the only transaction between the parties, or the only subject of difference between the parties, a bill in equity would not lie for the purpose; but in the relation which existed between these principals and their agents, His Honour could not take out of the transactions between them any particular topic or any particular article and say that because it was, in its nature, separate, therefore it could not be included in the relief which was sought by this bill. If so, the same might be said of every particular item in every account, because every account consists of items; and each particular thing might be taken out as not part of the account, such as the purchase of goods, advances of cash, and a variety of such items. If it was, as His Honour thought it was, a part of the duty of the agent to re-insure the ship upon the letters which he received, and if re-insurance formed any part of the general agency, it must be covered by the general agency accounts, and must be taken into consideration when those accounts are settled. *Turpin* v. *Bilton* (5 Man. & G. 455) and other cases which had been referred to did not in the slightest degree affect the principle.

His Honour then read passages from the letters, the answers, and the evidence, coming to the conclusion that the agency was established, the instructions were definite and explicit, the thing to be done was one in the ordinary course of business which Messrs. *Pickersgill* had undertaken, the excuse for not doing it was in itself insufficient and could not be relied upon in the least. In his Honour's opinion the Defendants had totally failed in suggesting excuses for not re-insuring. Therefore, upon the principles not only of the cases, but upon the commonest principles of justice and honesty, Messrs. *Pickersgill* having occasioned the loss by neglecting their duty as agents, the Defendants were liable to make it good.

The other matters in the bill were said to have been introduced as padding merely. But the Plaintiffs were not to be answered by such a suggestion as that. From the time when the agency began, the agents were bound to conduct their business prudently, properly, and above all, faithfully; and the Plaintiffs found out that there were certain things in the accounts which they were entitled to complain of. They filed the bill for an account, and there was no reason why they should not. It was said that the matters in dispute might be decided at law, and that there could not be an approach to this Court in any case where the principal had a right to have an account from the agent. The law was well settled as to that. It was, that a principal had a right to have an account from his agent. Of course he took it at his own risk. All that could be expected, or that could reasonably be required from him, was, that he should state a case to satisfy the Court that there was

(1) 14 C. B. (N.S.) 435, 460.

had to the brokerage, and that has not been disputed. Messrs. *Pickersgill* were general insurance brokers, and received this allowance from the underwriters, not in respect of this particular transaction, but on the balance of all the transactions, and it would

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some reason to dispute the accounts that had been rendered.

His Honour then expressed his opinion that the Plaintiffs were right as to the question of interest. But as to the allowance, that went upon much more delicate ground. Nothing was better settled in this Court than that if a man was an agent, that is, in other words, a trustee—an agent in a fiduciary character—it was incompetent to him to receive a gratuity of any sort or kind. That could not be disputed as a general principle, and the only question was, whether it applied to this particular case. Now this was simply the case of principals who could not be bodily present in this country, but employed another to enter into certain commercial engagements for them. Could anything be more strictly within the discipline of a fiduciary employment? The principal stipulated for the hire; he agreed to the commission to be paid, and then said: "Now, go in my name, in my person, on my account, for my interest, not for your own, go and do this thing for me;" and the agent went, and in his discharge of that duty he stipulated, or received a benefit for himself not included in the contract between himself and his principal. Was there an instance to be referred to where that had been allowed in a Court of Equity? There were plenty of instances to the contrary, but no case in which it ever happened that such agents as these gentlemen were had stipulated for themselves, or, without stipulation, had received for themselves any benefit of that nature. If Mr. *Lathers* had been here in his own person, as president of the society, he would have effected the insurance for himself, and would not have wanted a broker. If it suited these gentlemen, in the course of their business, to have dealings on another footing, well and good. They were perfectly competent to do so, but were not competent to take an allowance which, if it was made at all, would have been made in favour of the principal. If it was their intention to do so, then the observation of Lord Justice *James*, in the case of *Queen of Spain* v. *Parr* (39 L.J. (Ch.) 73, 76), applied directly: "If a man is going to charge commission, let him say it is commission."

Then it was said that because this was discovered in 1866, and the bill had not been filed till 1869, there had been acquiescence. It was easy to understand that there was not any very great disposition to quarrel with persons who had been so long connected together in important transactions of this kind, and His Honour could not think that the lapse of time furnished the least reason why the Plaintiffs should not, when they discovered it, have the accounts overhauled and put upon the right basis, and made consistent, not only with the principles of this Court, but with the principles of fair dealing between the parties. The Plaintiffs were entitled to a declaration that this loss happened in the course of transactions—and was not a separate transaction—not a thing which could be severed from the ordinary agency subsisting between the parties. They were entitled to the relief asked in that respect, and it

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be impossible to say what part of it belonged to any one transaction. Moreover, the Plaintiffs knew—at all events since 1866—that we were receiving this bonus, and yet they made no complaint. As to the interest, we are clearly right, and thus two out of the three heads of complaint are disposed of. The third, which relates to the loss of the ship, is a question of negligence, and must be tried at law. It is essentially a question for a commercial jury: *Moxon* v. *Bright* (1).

Mr. *Kay*, Q.C., and Mr. *Marten*, Q.C. (Mr. *Benjamin*, Q.C., with them), for the Plaintiffs:—

We employed Messrs. *Pickersgill* as our agents, and they acted for us as if they were our secretaries. They were merchants and not insurance brokers, and had no right to retain any allowance. They were bound to make this known to their principals, and could not put the money in their pockets. The terms between the parties were fixed, and they had no right to more. It is said that there was a custom to this effect, but we cannot be bound by it unless we knew it: *Queen of Spain* v. *Parr* (2); *Turnbull* v. *Garden* (3). We have, as principals, a right to an account: *Makepeace* v. *Rogers* (4). The question of neglect is no doubt a question of law, but may be raised in equity: *Piggott* v. *Williams* (5).

Mr. *Millar*, in reply.

SIR W. M. JAMES, L.J.:—

I am of opinion that the decree of the Vice-Chancellor must be reversed.

Though filed as a bill for a general account between principal and agent, the bill was really filed for the purpose of getting the opinion of this Court upon three questions, and three questions

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must be ascertained what the damage was which they had sustained. His Honour would have been very much pleased if a jury had had to consider this question; but the law required him to do so, and it was a duty from which he could not retire. The account must be taken in the way prayed by the bill, and the Defendants must pay the Plaintiffs' costs to the hearing.

(1) Law Rep. 4 Ch. 292.
(2) 39 L. J. (Ch.) 73.
(3) 38 Ibid. 331.
(4) 4 D. J. & S. 649.
(5) 6 Madd. 95.

only; in fact, that is the mode in which the bill itself states the case.

One question is, as to neglect with respect to the re-insurance of a ship followed by the loss of the ship; the next is the question of interest; and the third is the question of discount. Those are the only questions which have arisen, and the Plaintiffs so state. That being so, there is upon the face of the bill an admission against the Plaintiffs that but for those questions there would be nothing to litigate about in this Court or in any Court.

Now, how do those three questions stand? First of all, with respect to the interest, I am of opinion that the case intended to be made by this bill has wholly failed. The case intended to be made by the bill was, not that the Defendants were not entitled to claim interest with respect to the moneys that they paid, but that, instead of charging interest from the end of the year, which was the proper time to do it, they charged the interest from the time at which the actual sums were paid during the year; and the Plaintiffs allege, therefore, that the interest during that portion of the year ought to be disallowed. Then the answer to it is, that if the Defendants had been so minded, they were entitled to have charged interest from the time the premium was paid, or supposed to have been paid; but they did not, and only charged interest from the end of the year, which is upon the pleadings admitted to be right. The accounts are produced, and there is no trace of any such interest being charged, except at the end of the year. That was the mode of charging interest up to the end of the year, year by year upon the account, as the account then stood, which went on from the beginning of the account to the end of the agency. The course of dealing between the parties is established by a succession of accounts.

The next question relates to what are called the premiums or discount—the allowance or gratuity which brokers receive from the persons with whom they effect insurances. Now, the case upon that is this: the Plaintiffs say, "You are our agents, and you have received a gratuity in the course of that agency which you ought not to keep. You are mere agents, and according to the principle of the Court, a mere agent has no right to receive in the course of his agency any benefit for himself; he

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has no right to make any profit in the shape of discount, or anything of that kind." I believe that the principle is correctly laid down in the case of *Queen of Spain* v. *Parr* (1), but the questions here are, whether the agent has been otherwise reimbursed, and whether he has received a gratuity which his principal is supposed to be ignorant of. Whether Messrs. *Pickersgill* are called insurance brokers, or insurance agents, or merchants doing brokerage business or insurance business, the mere name is a matter of not the slightest consequence whatever. What was done was this: these were gentlemen, merchants in *London*, minded to do insurance business as agents of the Plaintiffs, and minded to do other business connected with it, and apparently doing insurance business, not only for the Plaintiffs, but for other clients who came to them. As stated on the part of the Plaintiffs, they were agents to underwriters, and settled losses in respect of policies; and whether we call them agents or not, they were agents or brokers to effect re-insurances in those cases in which re-insurances were thought right by the principals in *New York*. That was a part of the business. The other part of the business, it is quite clear, was the business which was thought to be the most profitable; and it was not likely that the Plaintiffs could get any other persons to act as agents without allowing them to obtain the profit of that particular business. Now with regard to the other part of the business, which is the underwriting, with respect to settling the losses, an actual agreement was made; the terms of remuneration were reduced to writing; but with regard to this part, not only are the terms of remuneration not reduced into writing, but no remuneration was ever paid by the Plaintiffs, or supposed to be paid by the Plaintiffs to Messrs. *Pickersgill* at all. It was done by them to obtain profit, and known to be a profitable part of the business. It was not profitable by reason of anything which was to be paid by the Plaintiffs to them as their paid servants, which seems to me to be the view which the Vice-Chancellor has taken. The view he took was, that they were the paid agents of the company, who could not do the business themselves; but they were not paid servants to do the work, receiving remuneration for it, and they were left to make the profit which was incidental to the business

(1) 39 L. J. (Ch.) 73.

itself. That was the character of their employment, otherwise it would not have been a profitable employment. The profit was not to come from the Plaintiffs in the shape of any direct payment; it was to be profit which should enure to Messrs. *Pickersgill* in the ordinary course of that kind of business. That was, the business of going to underwriters and getting the underwriters to accept the risks, paying them the premiums.

Whether you call him a broker or not, the person who is the agent for the merchant or anybody else, by a well-established practice obtains the insurances, and receives a discount of 5 per cent., which he puts into his own pocket. He is paid by the underwriter instead of by his principal. And then, by a practice quite as well known, recognised by everybody connected with the business, recognised by the Courts of Law of this country, referred to over and over again, there is another thing—there is a gratuity which the broker receives upon the settlement of the accounts, being 12 per cent. upon the balance, if the balance should happen to be a favourable one, that is, if the underwriter finds it to be a profitable account he gives 12 per cent. upon it to the broker who brought the business to him. It is not, as I gather, upon the particular transaction, but it is upon the whole result of transactions which the broker has introduced to the particular underwriter, and is calculated upon all the business during the whole year. That is the established remuneration which a broker receives for effecting that business, and in my opinion that is as right a thing as the 5 per cent.

The Plaintiffs have never disputed that the Defendants were entitled to retain in their own pockets the 5 per cent. They say, "We knew that, but we did not know of the other." But they never inquired. They say, "We meant it to be according to the usual practice," and they never made any inquiry about it until the year 1866, when it appears upon their own case that some conversation was had with Messrs. *Pickersgill*, and that they then told the vice-president of the company what the nature of their profit was, and he communicated it to the president. It is not pretended that there was a shadow of a complaint by those gentlemen at the time; and they allowed the matter to go on during the remainder of that year, 1866, and during 1867, and part of

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1868, without the slightest suggestion that there was anything wrong in what these agents were doing; and they were allowed to go on upon that understanding. I think that, after that, the dispute on the part of the company is deficient in honesty as well as in law. I think that, even if they had any reason to find fault before, they ought not to have disputed the thing when they allowed it to go on after 1866.

That disposes of the question of interest and of the question of the so-called discount.

Then with regard to the other point, I am of opinion that it never could be the subject of a suit in equity. I asked in vain for any authority, that as between principal and agent, with an outstanding account between them, you can introduce as an item into that account, an item of mere damages occasioned by the negligence of the agent in disobeying some instruction of his principal. The most analogous case to it is that which I suggested, of taxing a solicitor's bill, and taking cash accounts, but I have never heard that in such a case you can introduce into that account the loss sustained by the negligence of the solicitor in carrying on an action improperly, or in never investigating a case. That must be left to the common remedy of an action at law for negligence. In *Piggott* v. *Williams* (1), a solicitor having security for his costs, filed a bill to enforce that security; and there was a cross bill saying that there was nothing due, because there had been so much negligence that the solicitor was not entitled to recover. A demurrer was there allowed, but that was totally different, and would be a clear case, for the question would necessarily arise with regard to the security. But with that single exception, no case is suggested in which an action for negligence has been brought into this Court merely because there has been some money account between the person who has been the employer and the person who has been the employed in the matter in which the supposed negligence has arisen.

I am of opinion, therefore, that the bill was not right. The answer takes the objection as if the bill had been demurred to, and I am of opinion that a demurrer would have been allowed; and all the three points raised being decided against the Plain-

(1) 6 Madd. 95.

tiffs, the only consequence is, that the bill must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

The first question I will consider is, what remuneration were Messrs. *Pickersgill* entitled to charge the Plaintiffs for acting as agents for the Plaintiffs in effecting re-insurances and making themselves liable to pay the premiums on those re-insurances?

Now, the Plaintiffs, being a large insurance company in *New York*, by the letter of the 15th of June, 1858, proposed to Messrs. *Pickersgill* to act as their agents for the purpose of paying the amount due on policies when losses occurred which they were going to make payable in *England*. That was the principal matter which they wished to employ them for, and they asked what would be the charge which Messrs. *Pickersgill* would make if they were appointed agents for that purpose; and they answered that their charge would be 2½ per cent.: those were the usual terms for settling and paying claims. Then the Plaintiffs accept that offer, and mention in the letter in which they accept the offer that "we shall frequently have re-insurance and other business negotiations to make through you;" but they ask no question as to what will be the charge which Messrs. *Pickersgill* will make for effecting such re-insurances. Messrs. *Pickersgill* accept that offer, and the business goes on between the two parties, in the course of which re-insurances to a large amount are effected. In the accounts, as far as we have them before us, Messrs. *Pickersgill* in fact charge the company with the full amount of premiums, with interest payable from the 1st of January succeeding the time when the particular insurances are made; and the Plaintiffs go on settling the accounts, and paying from time to time during the eight years, making no objection to that mode of charging. It is obvious from that that they are not charged any brokerage, nor do they pay it.

Then it is quite obvious that they must have known, and they do not deny that they did know, that Messrs. *Pickersgill* were to be remunerated by receiving a certain allowance or discount from the underwriters with whom they made the bargains. It was easy to ascertain by inquiry what was the usual and ordinary charge which

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agents who effect re-insurances are entitled to make. If a person employs another, who he knows carries on a large business, to do certain work for him, as his agent with other persons, and does not choose to ask him what his charge will be, and in fact knows that he is to be remunerated, not by him, but by the other persons—which is very common in mercantile business—and does not choose to take the trouble of inquiring what the amount is, he must allow the ordinary amount which agents are in the habit of charging.

Now when we look at the reasons which are alleged why the *Great Western Insurance Company* should not allow the Defendants to retain the ordinary charge—it seems to me immaterial whether you call the agent a broker or not—all we find is, that they did not discover this practice as to the underwriters allowing the 12 per cent. upon any profit that might be made on the business as between the broker and the underwriter until the year 1866. But is that any reason why they should be allowed to re-open this matter, and have an account, and obtain a share or the whole of that 12 per cent. for themselves? I entirely agree with what the Lord Justice has said, that they, having discovered it in the year 1866, ought to have stopped it at once, and not to have gone on dealing for two years without making an objection, and then saying what they did. There is no reason to suppose that Messrs. *Pickersgill* would have consented to act for them on any other than the ordinary footing; and I think it probable that if the Plaintiffs had in 1866 gone to Messrs. *Pickersgill* and said, "You must give us the 12 per cent.," Messrs. *Pickersgill* would have declined the business on those terms.

It seems to me also quite clear on the question of interest; because the thing has long been settled with reference to this very peculiar business of insurance agents and brokers, that though the premium may never have been paid by the assured to the broker, and may not have been paid by the broker to the underwriter, yet as between the assured and the broker it is considered to have been paid from the moment of the insurance being effected, and the broker makes his own bargain with the underwriter when the premium is to be paid here. It appears to me to be perfectly

correct, and that there is no reason at all why this account should be taken and the matter re-opened for the purpose of fishing inquiries, for which there is no occasion or ground whatever, whether payments were made to the underwriters on the 1st of January or some time afterwards. It appears to me there is no right to make any such inquiries.

I also entirely agree that as to the last matter it is not a case for a Court of Equity, but is a case for a Court of Law only. Though in general I am very sorry to send persons from this Court to bring their suits in another Court, yet in this particular case I cannot help thinking that it is really a case for a mercantile jury to say whether there has been negligence in not reinsuring this ship, for which negligence the Defendants ought to be liable. I am very glad not to be obliged to express an opinion one way or other on the subject, no case having been cited to us in which the Court of Equity ever has taken upon itself to decide such a question. I am of opinion that the Court is not called upon to decide it, when the objection is taken as it is here.

The bill is dismissed with costs.

Solicitors for the Plaintiffs: Messrs. *Hollams, Son, & Coward.*
Solicitors for the Defendants: Messrs. *Waltons, Bubb, & Walton.*

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[1873 C. 73.]

Transfer of Mortgage—Interest—Payment of Interest before Transfer.

An estate subject to a mortgage was vested in *C.* upon trust to set apart out of the rents a fixed yearly sum, out of which he was to pay the interest on the mortgage and accumulate the residue as a sinking fund to pay off the principal. In June, 1864, the interest being in arrear, the mortgagees advertised the property for sale. *C.* thereupon applied to *F.* to pay off the mortgagees and take a transfer, which he agreed to do. The mortgagees would not stop the sale unless the whole arrear of interest and their costs were paid them, which *F.* at once did; and he subsequently paid them the interest down to September, 1864. The transfer was not made till August, 1865, and it purported to transfer the principal sum with interest only from September, 1864. A contemporaneous deed was executed by which *C.* pur-

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ported to charge the estate with the payment of a principal sum made up of the payments by *F.* in 1864, and the costs and interest thereon. It was admitted that this deed was invalid, as being beyond the powers of the trustee. A bill for redemption having been filed by the beneficial owners:—

Held (reversing the decision of *Hall*, V.C.), that *F.* was entitled to charge in his accounts the sums paid by him in 1864 for interest, notwithstanding the form of the deeds of 1865, and the fact that *C.* was guilty of a breach of trust in allowing the interest to be in arrear.

THIS was an appeal by the Defendant *Finney* from part of a decree of Vice-Chancellor *Hall*.

Mr. *Tulk*, by will, dated the 23rd of September, 1848, devised the real estates mentioned in the seven schedules to his will to the use of trustees in fee; in trust, until his mortgage debts had been paid, to raise out of the rents £1600 per annum, and apply it first in paying the interest on his mortgages, and then to accumulate the surplus to form a fund for paying off the principal. Subject as above, he directed that the estates in the seven schedules should be held on the trusts therein declared concerning the same respectively, the trusts of the property in the seventh schedule being for his daughter, *Sophia Augusta Cottrell*, for life, for her separate use, with a restraint upon anticipation, and after her death (subject to a power given to her of appointing a life interest to her husband) upon trusts for her children.

The testator died in 1849. After his death proceedings were taken for the execution of the trusts of his will by the Court, and by an order of the Court in 1853 directions were given for apportioning the incumbrances upon the estates in the several schedules, and it was ordered that £2819 3*s.* 8*d.* should be charged on the property in the seventh schedule. *Charles Herbert Cottrell* and *George Edward Cottrell* were appointed trustees of the property in the seventh schedule, and were ordered to set apart out of the rents of that property the yearly sum of £245, and to pay the interest on the mortgage, and accumulate the residue as a sinking fund for payment of the principal.

The arrangement for making the property in the seventh schedule liable only to the £2819 3*s.* 8*d.*, was carried into effect with the concurrence of the mortgagees, so that this property became subject only to a mortgage in fee for that sum. In 1860 the mortgagees transferred their security to *Pearce*, *Macnair*, and *Winter*.

In June, 1864, *Pearce, Macnair*, and *Winter*, whose interest was in arrear, advertised the estate for sale, and Mr. *Finney* was applied to on behalf of *G. E. Cottrell*, the surviving trustee, to pay them off and take a transfer. This he agreed to do, but the mortgagees refused to stop the sale unless the arrears of interest and the auctioneer's charges were at once paid. *Finney*, accordingly, on the 14th of June, paid them the amount, which was £195 8*s.*, and on the 19th of September, 1864, he paid them the further sum of £54 19*s.* 4*d.* for interest, making in all £250 7*s.* 4*d.*

Considerable delay took place in completing the transfer, which was not executed till the 28th of August, 1865, by which day £122 19*s.* 1*d.* had become due for interest accrued due since the 19th of September, 1864, and £44 4*s.* 8*d.* for costs, making together £167 3*s.* 9*d.*, which was paid by *Finney*, along with the principal, on the completion of the transaction, which was carried into effect by the two following deeds:

The first of these deeds was an indenture dated the 28th of August, 1865, made between *Pearce, Macnair*, and *Winter* of the first part, *Cottrell* of the second part, and *Finney* of the third part, by which, after reciting the transactions down to the transfer to *Pearce, Macnair*, and *Winter* inclusive, and reciting that the principal remained due, with some interest thereon and some costs, and that *Pearce, Macnair*, and *Winter* had called upon *Cottrell* to pay off the mortgage, and that *Finney* had agreed at the request of *Cottrell* to pay to them the principal sum of £2819 3*s.* 8*d.*, "together with the arrear of interest and costs, amounting together to the sum of £167 3*s.* 9*d.*," upon having such transfer as thereinafter mentioned of the mortgage security, it was witnessed that in consideration of £2986 7*s.* 5*d.* paid to *Pearce, Macnair*, and *Winter* by *Finney*, at the request of *Cottrell, Pearce, Macnair*, and *Winter* assigned to *Finney* the said principal sum of £2819 3*s.* 8*d.*, and the £167 3*s.* 9*d.* for interest and costs, making together the sum of £2986 7*s.* 5*d.*, and all interest thenceforth to grow due in respect thereof; and by the same deed *Pearce, Macnair*, and *Winter* conveyed the mortgaged property to *Finney* in fee, "subject to the equity of redemption subsisting in the same hereditaments by virtue of the hereinbefore recited indentures of mortgage or any of them."

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By another indenture of the same date, made between *G. E. Cottrell* of the first part, *Charles Furber* of the second part, and *Finney* of the third part, reciting the last-mentioned indenture, and reciting that there was due from *Cottrell* to *Finney* the sum of £513 12*s.* 7*d.* for costs in respect of the last-mentioned indenture, and the now stating indenture, and for interest, and that *Cottrell* had agreed to secure the repayment of the last-mentioned sum, and also the £167 3*s.* 9*d.*, making together £680 16*s.* 4*d.* with interest thereon, in manner thereinafter appearing, *Cottrell* covenanted with *Finney* to pay the £680 16*s.* 4*d.* on the 29th of January, 1866, with interest at 5 per cent. per annum, and conveyed to *Finney* in fee the equity of redemption in the same property by way of mortgage for securing the repayment of the £680 16*s* 4*d.*, with interest. *Furber* was appointed receiver.

Finney afterwards, in November, 1872, took possession of the mortgaged property, his interest not being at the time in arrear. Some correspondence ensued, in which *Finney* insisted upon his securities as effectual to their full extent, and the present suit was thereupon instituted by *Sophia Augusta Cottrell* and her children for redemption.

By the decree of Vice-Chancellor *Hall*, dated the 18th of March, 1874 (1), it was ordered that an account should be taken of what

(1) 1874. Mar. 18.

SIR CHARLES HALL, V.C.:—

The substantial and main question in this case is, whether or not the two sums which were paid for interest by Mr. *Finney* pending the completion of the transfer of the mortgage are sums which are properly chargeable in his favour in taking the account which is to be taken against him as transferee of the mortgage. The payments were made by Mr. *Finney* after an arrangement had been come to that he should become the transferee. The mortgagees were then pressing for payment of their money, they had advertised the property for sale, and the payment was made in order to stop that sale. There was considerable delay in investigating the title, and during that delay a further sum became due for interest, in addition to the first and second payments which had been made, and there were the ordinary costs which the mortgagees incurred in relation to the transfer. That Mr. *Cottrell* was not the client of Messrs. *Deane & Co.*, I hold to be as a matter of fact upon the evidence made out. Mr. *Deane*, knowing Mr. *Cottrell*, heard from him that so much money was wanted upon the security of this property. Mr. *Deane* had a client who had money at his command, Mr. *Finney*, and applied to him in the ordinary way to know if he would make the advance, and continued to act as his solicitor in the matter; but did not act as the solicitor

was due to *Finney* as transferee under the indenture of transfer of the 28th of August, 1865, for principal and interest, and for the costs of that transfer paid by him, and for his costs of the transfer and for his costs of the cause subsequent to decree. An account of rents from November, 1872, was directed with half-yearly rests, and the usual subsequent directions followed.

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of Mr. *Cottrell*. At the time then when the deeds came to be executed a further sum was due for interest.

The first deed which was executed was a transfer of the mortgage which deals with the capital sum owing upon the mortgage, and such interest as at that time had not been paid to the mortgagees, that was all they had to transfer, and all that concerned them to deal with in that transfer. No doubt in that deed there might have been put in a statement of the payment by the transferee of the two sums which had been paid previously for arrears of interest, and perhaps it would have been well if that had been done if it was intended that the result of the transaction should be that those two sums were to be kept alive, and to be considered exactly in the same position as they would have been in if they had never been paid at all to the transferors, that is, if the moneys remained still owing upon the mortgage in addition to the further sum of interest which was owing at the time of the execution of the deeds.

Then another deed was executed contemporaneously, in which, after stating the transfer of the mortgage which had been made by the other deed, it is stated that there is now due from *Cottrell* to *Finney* £513 12*s.* 7*d.*, the costs in respect of the last recited indenture, these presents, and for interest, and that *Cottrell* "has agreed to secure the repayment of the last-mentioned sum, and also the sum of £167 3*s.* 9*d.*, making, with the sum of £513 12*s.* 7*d.*, the sum of £680 16*s.* 4*d.* with interest thereon in manner hereinafter appearing." The main object, no doubt, of this second deed was to turn that which was then interest and costs not bearing interest into a capital sum which would bear interest. That was the object and intent of the second deed, and therefore, the parties having that object and purpose, treat the aggregate amount as money raised (so I must consider it, I think, for the purpose of this deed) by *Cottrell*, he being the trustee under the will. He is the person who raises and affects to charge that upon the estate as a capital sum which should bear interest from the time when this new deed was executed, up to which time the account was made up. There is no attempt in that deed to represent that in respect of any portion of that sum Mr. *Finney* was to stand in the shoes of the transferors, or was to occupy their position in respect of their rights and interests as mortgagees in respect of that sum; but the parties treat this as entirely a new transaction, dealing with Mr. *Cottrell*, and he making the security. The parties conceiving, I daresay, at that time that Mr. *Cottrell*, in his position of trustee of the estate, was in a position to give such a security, it is taken as from him without in any way attempting to preserve any other existing right or interest in respect of any then existing lien upon the estate. Mr. *Finney* voluntarily treats Mr. *Cottrell*

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This decree, it will be seen, gave *Finney* no costs up to the hearing, and treated him as having no lien on the mortgaged property for the amount which, during the negotiations, he had paid to *Pearce*, *Macnair*, and *Winter* for interest and costs. *Finney* appealed.

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as the debtor, and takes from him a security, conceiving, apparently, that he could give security for the whole sum so as to make it bear interest. That was undoubtedly a mistake. He was not in a position to do that, although, circumstanced as the estate was, it is not improbable that if the matter had been done under the sanction of the Court ways and means would have been found of capitalizing the whole amount in order to save the estate. However, the parties did not do that; although they might have framed their transfer, or put into this separate deed something to shew that they were attempting to keep up the old security, they go upon an entirely different footing in this deed, and I regret that this deed was in fact framed in this way, because the result of the view I take is, that the persons seeking this redemption get an advantage in respect of the balance of interest which if the deed had been otherwise framed they would not have got, for I do not think it is made out in any way that Mr. *Finney*, in respect of notice or knowledge of the position of Mr. *Cottrell* with reference to the estate, would have been in any way affected if the deeds were otherwise framed. Having the written documents between the parties, and it not being alleged or shewn in evidence that it was part of the bargain when these moneys were advanced on account of the interest that *Finney* should stand in the shoes of the original mortgagees in respect of that, so that it could be suggested that these deeds were improperly framed, or not so framed as to give effect to the actual bargain and the true intent of the parties, I am bound to go by the deeds themselves, and give the parties the rights and interests they can have by the deeds, and no other. It is conceded that in respect of the costs of the transfer, although those are affected to be included in these deeds, that is, the costs of the transferors, and the costs of the transferees in respect of the transfer itself, would be costs without any provision at all which would be properly claimable against the estate. Therefore, in taking the account those costs must be included and provided for. Beyond that, I cannot give the mortgagee, Mr. *Finney*, any more than he would be entitled to as transferee under the first of those deeds, that is, principal, interest, and costs, including the costs I have mentioned.

That being so, the next question for consideration is how is the account to be taken with reference to Mr. *Finney* being the mortgagee in possession. As regards that I am not satisfied, considering the deed appointing a receiver, that it would be just to treat Mr. *Finney* as mortgagee in possession until the time when possession was taken under the notices given in 1872. Therefore, the account will only be taken as from that time. It being admitted that there were then no arrears of interest, it must be taken in the usual way with half-yearly rests.

I think the only other question which I have to consider is as regards the costs of the suit. The costs of the suit have been occasioned, I think, substantially, by the Defendant insisting upon this second deed as entitling him

Mr. *Greene*, Q.C., and Mr. *Graham Hastings*, for the Appellant:—

The sums paid by *Finney* before the transfer ought to have been allowed. The deed of further charge should not be held to deprive *Finney* of a benefit to which he was entitled independently of it. *Finney* ought to have his costs: *Norton* v. *Cooper* (1); *Cotterell* v. *Stratton* (2).

Mr. *Dickinson*, Q.C., and Mr. *Lake*, *contrà*:—

The trustee who committed a breach of trust by not paying the interest could not acquire or give a lien on the property for it to a person who had notice of the breach of trust: *Clack* v. *Holland* (3); *Loftus* v. *Swift* (4). The second deed makes *Cottrell* the debtor, and *Finney* must look to him for the moneys mentioned in it.

SIR W. M. JAMES, L.J.:—

With regard to the sums paid by Mr. *Finney* in the year 1864, I am unable to arrive at the same conclusion as Vice-Chancellor *Hall*. I am bound to say that it would be a most ruinous thing for mortgagors and mortgaged estates if we were to hold that because an estate in mortgage is a trust estate no person could advance money honestly and *bonâ fide* to save the estate from the ruinous consequences of a forced sale by the mortgagees without being fixed with a liability to answer for all the breaches of trust that might have been committed by the trustee in respect of the non-payment of the previous interest upon the security. It has

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to all that that deed provides for. To a great extent it certainly provides for that to which he is not entitled, namely, for interest upon interest, and interest upon costs. Therefore, there is an improper claim for interest, and, as I also hold, an improper claim in respect of those two sums paid during the negotiation for the transfer. Considering, however, on the other hand, that the parties redeeming have got a benefit from the mode of framing these deeds, I am not disposed to make *Finney* pay the costs up to the hearing, and I am of opinion that his conduct has not been so oppressive or vexatious as to bind me to do so. I do not, however, think, under the circumstances, that I can give him his costs. The proper course will be to direct that there shall be no costs on either side up to and including the hearing.

(1) 5 D. M. & G. 728.
(2) Law Rep. 8 Ch. 295.
(3) 19 Beav. 262.
(4) 2 Sch. & Lef. 642.

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not been contended before us, and, as I understand, it was not contended in argument before the Vice-Chancellor, that the sum paid for interest and the sum paid for costs upon that occasion could be converted into principal so as to bear interest. The modern practice of the Court in this respect is well settled, although it certainly differs very much from some old cases which I have before me, in which it seems to have been held as a matter of course that upon a reasonable transfer of a mortgage security to a transferee, all sums paid were converted into principal. I have been particularly struck with *Lord Chesterfield* v. *Lady Cromwell* (1), where this was done: the Lord Chancellor being reported to have said, "that though regularly interest shall not carry interest, yet that in some cases and some circumstances it would be injustice if interest should not be made principal; and the rather in this case because it was for the infant's benefit, who, without this agreement, would have been destitute of subsistence." There seems to me to be a great deal of good sense in that judgment, although the rule of the Court is now otherwise, and accordingly it has not been contended before us that the transferee can have anything more than what was actually paid for interest and costs, without interest upon it. What took place was this: Whether through the default of Mr. *Cottrell*, the trustee, or not, or rather, as we must assume, through the default of Mr. *Cottrell*, the interest was in arrear—I cannot differ it from the case of a leasehold estate with rent in arrear, and the landlord being about to enter for a forfeiture—the interest was in arrear, the mortgagees were about to sell, and had employed an auctioneer to sell the estate. It was advertised for sale, and the sale was coming off in a few days. Upon that the trustee, who may previously have been guilty of neglect, goes to a solicitor, whom he believes to have monied clients, and asks him to find somebody to take a transfer and so prevent a sale. The solicitor finds a gentleman who acted with great liberality, for, without waiting for a transfer of the mortgage, he immediately advanced the money necessary to stop the pending sale. The sale was stopped, and the property was thereby saved, and, I suppose, from its being the subject of a suit it is a valuable property, worth much more than the amount secured upon it. Then matters go on. The

(2) 1 Eq. C. Ab. 287, pl. 1.

title is looked into; there is a long delay, I cannot understand why, in completing the transaction, and in the meantime a further arrear of interest was paid before the transfer. Then there was a transfer made of the security, and in that transfer, rightly enough as between the mortgagee and transferee, the mortgagee, having been paid, it being no matter to him by whom, would not assign anything except what was due to him. If he had assigned a larger sum than was due to him, he would have probably exposed himself to some risk under the covenant, because the covenant would be that he had done no act to incumber what he had assigned. He would be liable upon that covenant, and it was therefore quite right that the assignment should only be of the sum actually due. But that was not intended to relieve the estate from the right which it appears to me (as it did also to the Vice-Chancellor) existed by the mere payment by Mr. *Finney*—that is to say, he paid the money on behalf of the estate to save the estate, and acquired an interest in the equity of redemption. That would entitle him to redeem the estate, and add that to the money he paid and have the estate transferred to him. The Vice-Chancellor, however, was of opinion that the substance of the transaction was to be altered to the prejudice of Mr. *Finney* by reason of the form which the contemporaneous deed assumed—that the transfer deed represents a particular sum only as due, the other moneys are made the subject of a distinct charge. It is admitted that the distinct charge *quâ* charge cannot stand. If the charge cannot stand as it is, if the trustee could not make the charge which he intended to make for the benefit of Mr. *Finney*, converting the arrears of interest into principal and giving him security upon the estate for that principal, and interest at 5 per cent., if the deed cannot take effect for the purpose and in the form in which it was executed, is a Court of Equity to say it is to have no effect so far as it was intended to give a benefit to Mr. *Finney*, but that it is to have the effect of entirely destroying a right which Mr. *Finney* then had independently of it, viz., the right to have the arrears of interest paid to him on the redemption of the estate? That would be, in my opinion, to make the form destroy the substance, the letter kill the spirit, and to deprive Mr. *Finney* of a right against the estate which Mr. *Finney* never intended to give up, which the estate

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never contracted that he should give up, and from which there was no equity as between *Finney* and the estate that the estate should be relieved.

It was said that time was given for the conversion of interest into principal as between *Finney* and *Cottrell*, and that that shewed that *Cottrell* was treated as the debtor. He was the debtor as far as he was the person at whose request the money was paid, but he was not the debtor for whose benefit the credit was given in exoneration or exclusion of the estate. No transaction between Mr. *Finney* and Mr. *Cottrell* could have deprived the *cestuis que trust* of their right to call Mr. *Cottrell* to account for all the arrears of money which were in his hands by a breach of trust for which he is liable at this moment. It appears to me there is no ground for the application of the rule applicable to cases of principal and surety; viz., that where a person is primarily liable, and another person secondarily liable, if the creditor gives time to the person who is primarily liable, the other person is therefore released. The case rests simply upon this, that the money was honestly paid by Mr. *Finney* for the benefit of the estate, for the safety of the estate, and the estate ought to bear it. I am of opinion that Mr. *Finney* is entitled to the sums of money which he has so paid.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The Vice-Chancellor, as I understand his judgment, appears to have thought that if these two sums of £195 8*s.* and £54 19*s.* 4*d.*, which were paid by Mr. *Finney* to the mortgagees for interest, had been included in the debts assigned by the mortgagees to Mr. *Finney*, then Mr. *Finney* would have been entitled to charge them as against the estate; but he seems to have come to the conclusion that because they were not included in that assignment, and were made the subject of a separate charge, that therefore they cannot be charged. Now that appears to me to be going too far. The only consequence of their not being included in the assignment is, that the deed itself does not prove as a matter of fact that these sums were paid in anticipation of the transfer by a proposed transferee for the purpose of saving the estate from being sold. The consequence of their not being

included in the deed is merely that that fact is not proved by the deed, but I can see no good reason for not allowing it to be proved *aliunde*.

Upon the evidence it is perfectly clear that, as a matter of fact, these two sums were paid on Mr. *Finney's* account, in anticipation of an intended transfer to him, and on the security of the estate, and not primarily on the personal security of Mr. *Cottrell*. Having been so paid as a matter of fact, I can see no good reason why they should not be a charge on the estate when the mortgage comes to be redeemed. It is a fallacy to say, as was said in the argument, that the effect would be that the mortgagors would pay them twice over. The mortgagors have never paid them at all; because, although it is perfectly true that Mr. *Cottrell* had money in his hands out of which he might have paid them, his having wrongly appropriated money out of which he might have paid them does not amount to a payment in point of fact. They have not been paid at all, and they now come to be paid for the first time out of the estate.

Mr. *Lake* was then heard upon the question of costs.

SIR W. M. JAMES, L.J.:—

The main point which the Vice-Chancellor had to decide was decided by him one way, and has been decided by us the other way; and the main point being decided in favour of the mortgagee, the principal ground upon which the Vice-Chancellor proceeded in dealing with the costs seems to me to fail. The only question is, whether there is really anything in this case to take it out of the ordinary rule, there being a sum found due to the mortgagee, his right to which the mortgagor resisted at the hearing. The rule of the Court is, as laid down in *Cotterell* v. *Stratton* (1), that the mortgagee is entitled to his security as security for principal, interest, and costs—that is, the costs of a redemption suit or foreclosure suit—unless the mortgagee has either refused or has been offered the full sum due to him, in which case he loses all subsequent interest, and all costs, and is made liable to pay costs; or unless the Court sees that the conduct of the mortgagee has been oppres-

(1) Law Rep. 8 Ch. 295.

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sive, and that he has been availing himself of his power to extort something which he ought not to have, or doing something which this Court regards as unconscientious. That is not applied to the case of a mortgagee claiming more than is really due to him upon something which was a fair question of dispute between them, and the point in dispute being not concealed, he simply saying, "I claim so much under such circumstances," and the other man saying "You are not entitled to that, that is a thing that must be determined by the Court in the cheapest way." And in this particular case the parties have shewn commendable economy in the mode of bringing the case to a hearing. Those questions have been raised with a very small amount of litigation. There is the bill, the answer, and one page of an affidavit on the part of the Plaintiff, and two or three pages of affidavits on the part of the Defendant, the greater part going to one particular item of an account which has yet to be taken in Chambers. That being so, it seems to me to be utterly impossible to say that there has been vexatious or improper conduct on the part of the mortgagee that has led to any expense on the part of the mortgagor. It seems to me that the rule laid down in the case I referred to ought to be adhered to, and that the mortgagee is entitled as of course to his principal, interest, and costs as the price of giving up the estate. The Vice-Chancellor's order will therefore be varied in all the particulars to which the appeal is directed, and the mortgagee will add his costs of the appeal to his security.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Deane, Chubb, & Co.*; Mr. *W. Ley.*

In re WHEAL VYVYAN MINING COMPANY.

L. JJ.
1874
June 4.

WESCOMB'S CASE.

Winding-up—Costs of Official Liquidator.

Where the official liquidator of a company appears as a Respondent in an appeal in the winding-up, and his costs are not payable by any party to the appeal, they will not be given out of the estate by the Court of Appeal; but he will be left to apply for them to the Judge of the Court below, who will order payment of them out of the estate unless he sees reason to the contrary.

THIS was an appeal by *Ann Wescomb*, the executrix of *Charles Wescomb*, the former purser of the *Wheal Vyvyan Mining Company*, from an order of the Vice-Warden of the Stannaries reducing by £256 the balance due from the company to *C. Wescomb* on his accounts, for which she now claimed to prove against the company under the winding-up.

This sum of £256 was the amount payable for calls on the shares held by a Mr. *D'Arcy* in the company. The case raised by Mr. *Divett*, a principal shareholder, was, that *Wescomb* had made himself liable to the company to pay the amount of *D'Arcy's* calls, and as nothing could be obtained from *D'Arcy*, *Wescomb* must be debited with them. The Vice-Warden decided according to this contention. Mrs. *Wescomb* appealed.

Mr. *W. Pearson*, Q.C., and Mr. *W. W. Karslake*, for the Appellant.

Mr. *Dickinson*, Q.C., and Mr. *Graham Hastings*, for *Divett*, supported the order of the Court below.

Mr. *Kekewich*, for the official liquidator.

THEIR LORDSHIPS, being of opinion that the claim against *Wescomb* was not made out on the evidence, reversed the decision of the Vice-Warden, and directed that Mrs. *Wescomb* should have her costs in the Court below out of the estate, no order being made as to the costs of the appeal.

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Mr. *Kekewich*, for the official liquidator, asked for his costs out of the estate. He referred to *Ship's Case* (1) and *Bush's Case* (2).

THEIR LORDSHIPS held that the costs of the official liquidator should be in the discretion of the Court below, and that he must be left to apply for them there. It was to be understood that in a case where the liquidator was brought here as a Respondent he was entitled to his costs out of the estate, unless there was some reason to the contrary; but it was best that it should be left to the Court which had the conduct of the winding-up to order payment of them.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle*; Mr. *W. Moon*; Messrs. *Church, Sons, & Clarke*.

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In re IMPERIAL RUBBER COMPANY.

BUSH'S CASE.

Paid-up Shares—Issue of Shares—Certificate—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

A company agreed to purchase property for paid-up shares, and accordingly the directors passed a resolution to allot a corresponding number of shares to the vendors and their nominees. Two months afterwards, the agreement between the vendors and the company was filed with the Registrar of Joint Stock Companies. One of the nominees had sold twenty of the shares, and the transfer was registered three days before the agreement had been filed, but no certificate as to these shares was issued until a fortnight afterwards:—*Held*, that the shares were not issued within the meaning of the *Companies Act*, 1867 (30 & 31 Vict. c. 131), s. 25, until the certificate was issued, and that they were paid-up shares in the hands of the purchaser.

Order of *Bacon*, V.C., affirmed.

THE *Imperial Rubber Company, Limited*, was registered on the 24th of October, 1868. At the second meeting of directors, held on the 19th of January, 1869, a resolution was passed accepting the terms for the purchase from Messrs. *Wilson & Mayall* of the *Lifford Mills* and of certain patents, at the price of £2000 cash and 5600

(1) 13 W. R. 599. (2) Law Rep. 6 Ch. 246

£5 paid-up shares. At the third meeting, held on the 25th of January, 1869, it was resolved that the shares agreed to be paid to Messrs. *Wilson & Mayall* be at once allotted, and that the secretary be directed to prepare certificates to be handed over on the execution of the transfer. An entry was accordingly made on the same day in the journal of the company that 1200 shares were allotted to *Wilson*, 1200 to *Mayall*, and 3200 to *S. B. Tucker*, a nominee of *Wilson & Mayall*. The certificates of *Wilson's* shares and *Mayall's* shares were apparently made out and dated on the 25th of January, 1869. Those of *Tucker's* shares were dated at different times, the shares in question in this case bearing date the 7th of April, 1869.

The deeds of transfer of the *Lifford Mills* and the other property were dated the 1st of February, 1869, and an agreement stating the terms of the purchase was, on the 24th of March, 1869, filed with the Registrar of Joint Stock Companies. In March, 1870, Mr. *Bush* bought of *Tucker* twenty shares as fully paid. The transfer was registered as on the 21st of March, 1870, but the share certificate given to *Bush* was dated the 7th of April, 1870, and it did not appear that any previous certificate had been issued, or that the shares had been registered in *Tucker's* name.

The company was ordered to be wound up, and Mr. *Bush* having objected before the Chief Clerk to be placed on the list of contributories, his case was adjourned into Court.

The Vice-Chancellor *Bacon* ordered Mr. *Bush's* name to be excluded from the list. The official liquidator appealed.

Mr. *Swanston*, Q.C., and Mr. *Graham Hastings*, for the Appellant:—

No doubt the certificate was not issued until after the agreement was registered, but we say that the shares were issued to *Tucker* when they were allotted to him, and *Bush* cannot be in a better position than *Tucker* was. *Tucker* had an absolute interest in them on the 25th of January, for the issue of the certificates was not the issue of the shares: *Maynard's Case* (1). The question turns on the 25th section of the *Companies Act*, 1867 (30 & 31 Vict. c. 131), and the burden is on *Bush* to shew that these shares

(1) *Ante*, p. 60.

L. JJ. 1874 BUSH'S CASE.

are to be taken as fully paid. If he is obliged to pay he can recover from *Tucker*. The company is not estopped by the mere entry in the books that the shares are paid up. The shares were issued within the meaning of the section when they were allotted.

Mr. *Kay*, Q.C., and Mr. *Romer*, for Mr. *Bush*, were not called upon.

SIR W. M. JAMES, L.J. :—

This is an idle and vexatious appeal.

Mr. *Bush* was the holder of shares which were transferred to him through a person recognised as the holder of them. He got from the company a certificate, on which it appeared that they were paid-up shares. The Act of Parliament says, no doubt, that shares issued in that way shall be deemed to be issued and held subject to the payment of the whole amount in cash, unless the contrary is determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies.

There is in this case a contract in writing made between the company on the one side and the vendors on the other, which is connected with these shares, and in that contract it is said that certain shares are to be fully paid-up shares as part of the consideration. There is no evidence that the shares ever left the control of the company, or ever became the property of Mr. *Tucker*, or of any one else, until the certificate was issued in accordance with the resolution previously passed, and on that his title is complete. Apparently, Mr. *Bush* bought under that title, which is a perfect and complete title, upon the documents which the company itself is bound by.

I am of opinion that it would be an act of the grossest injustice to Mr. *Bush* if we were to endeavour to make him liable upon these shares.

I am bound to express my regret and disapprobation at and of the conduct of official liquidators in these companies, who think that this particular section of the Act, because it was made for the benefit of creditors, is intended to enable them to make innocent and honest men pay money which they never intended to pay. It is a mistake to suppose that the Court is called upon to put a

forced construction upon the Act for the purpose of enabling that injustice to be done.

This appeal is dismissed with costs.

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SIR G. MELLISH, L.J. :—

I am of the same opinion.

Solicitors for the Appellant: Messrs. *Harper, Broad, & Battcock.*
Solicitors for Mr. *Bush:* Messrs. *Linklaters & Co.*

In re ORIENTAL INLAND STEAM COMPANY. *Ex parte* SCINDE RAILWAY COMPANY.

L. JJ. 1874 *July* 1.

Winding-up—Attachment—Property Abroad—Foreign Judgment—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 163.

When a company has in this country been ordered to be wound up, judgment creditors who are in this country, and have proved under the winding-up, will not be allowed to attach property in *India* belonging to the company

Order of *Malins*, V.C., affirmed.

THE *Oriental Inland Steam Company* and the *Scinde Railway Company* were both English companies having their chief offices in *England*, but carrying on business in *India*. On the 23rd of May, 1867, the *Scinde Company* obtained in *India* judgment against the *Oriental Company* for Rs.40,122.

On the 8th of November, 1867, an order to wind up the *Oriental Company* was made in *England*, and on the 12th of March, 1868, the *Scinde Company* came in under the winding-up and proved their debt.

On the 28th of January, 1869, the *Scinde Company*, proceeding under their judgment, attached certain property in *India* belonging to the *Oriental Company*. By an order made on the 4th of March, 1869, in the winding-up, the *Scinde Company* was ordered to withdraw the attachment, without prejudice to any question; and upon the *Scinde Company* undertaking to abide by any order of the Court, the official liquidator was ordered, out of the proceeds of the sale of property in *India* belonging to the *Oriental Company*,

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to pay the *Scinde Company* the amount of principal, interest, and costs then due to them.

The attachments were accordingly withdrawn, and Rs.19,813 were paid by the official liquidator to the *Scinde Company* in satisfaction of their claim; the remainder of their claim having been satisfied by sales under attachments before the winding-up.

The official liquidator applied by summons that the *Scinde Company* should repay this sum of Rs.19,813, and the Vice-Chancellor *Malins*, on the 18th of April, 1874, made an order accordingly.

The *Scinde Company*, appealed.

Mr. *J. Pearson*, Q.C., and Mr. *Marten*, Q.C., for the Appellants:—

We are ready to abandon our claim under the winding-up here, and then we ought not to be prevented from retaining what we have received in *India*. The only result of our giving up our attachment, or not issuing it, would have been to allow other execution creditors in *India* to take the property. If those creditors are not in this country this Court will have no jurisdiction over them: *Bank of Hindustan* v. *Premchand* (1), and it is very hard upon us that they should thus obtain an advantage over us. If this is the law the result in all these cases will be to hand over the assets to those creditors who happen to be out of the jurisdiction. *In re Kelson* (2) was a case of inspectorship only.

Mr. *Glasse*, Q.C., and Mr. *Whitehorne*, for the *Oriental Company*, were not called upon.

SIR W. M. JAMES, L.J.:—

I am of opinion that the order of the Vice-Chancellor in this case is perfectly right.

The winding-up is necessarily confined to this country. It is not immaterial to observe, that there could now be no possibility, having regard to the decision of the Supreme Court of *Calcutta*, in *Bank of Hindustan* v. *Premchand*, which we must take to be quite right, of treating this case as if there were an auxiliary winding-up in *India*. If this is so with regard to a company domiciled in *England*, but having its business and assets in *India*, there would be no ground for the contention on the part of the

(1) 5 Bomb. H. C. Rep. 83. (2) Law Rep. 4 Ch. 125.

Appellants that they would obtain an equitable and rateable distribution of the assets between the creditors. All the assets there would be liable to be torn to pieces by creditors there, notwithstanding the winding-up, and there would be an utter incapacity of the Courts there to proceed to effect an equitable distribution of them. The English Act of Parliament has enacted that in the case of a winding-up the assets of the company so wound up are to be collected and applied in discharge of its liabilities. That makes the property of the company clearly trust property. It is property affected by the Act of Parliament with an obligation to be dealt with by the proper officer in a particular way. Then it has ceased to be beneficially the property of the company; and, being so, it has ceased to be liable to be seized by the execution creditors of the company.

There may, no doubt, be some difficulty in the way of dealing with assets and creditors abroad. The Court abroad may sometimes not be disposed to assist this Court, or take the same view of the law as the Courts of this country have taken as to the proper mode of dealing with such companies, and also with such assets. If so, we must submit to these difficulties when they occur.

In this particular case there is no such difficulty. There were assets fixed by the Act of Parliament with a trust for equal distribution amongst the creditors. One creditor has, by means of an execution abroad, been able to obtain possession of part of those assets. The Vice-Chancellor was of opinion that this was the same as that of one *cestui que trust* getting possession of the trust property after the property had been affected with notice of the trust. If so, that *cestui que trust* must bring it in for distribution among the other *cestuis que trust*. So I, too, am of opinion, that these creditors cannot get any priority over their fellow-creditors by reason of their having got possession of the assets in this way. The assets must be distributed in *England* upon the footing of equality.

The Vice-Chancellor's judgment must therefore be affirmed, and the appeal dismissed.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

I quite agree that the 87th section of the Act of 1862, pro-

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viding that no action shall be brought without the leave of the Court, and the 163rd section, enacting that no execution shall issue, apply only to the Courts in this country. Of course, Parliament never legislates respecting strictly foreign Courts. Nor is it usually considered to be legislating respecting Colonial Courts or Indian Courts, unless they are expressly mentioned. Still, that appears to me not to prevent the general application to this case of the principles which have been established in cases of bankruptcy.

No doubt winding-up differs from bankruptcy in this respect, that in bankruptcy the whole estate, both legal and beneficial, is taken out of the bankrupt, and is vested in his trustees or assignees, whereas in a winding-up the legal estate still remains in the company. But, in my opinion, the beneficial interest is clearly taken out of the company. What the statute says in the 95th section is, that from the time of the winding-up order all the powers of the directors of the company to carry on the trade or to deal with the assets of the company shall be wholly determined, and nobody shall have any power to deal with them except the official liquidator, and he is to deal with them for the purpose of collecting the assets and dividing them amongst the creditors. It appears to me that that does, in strictness, constitute a trust for the benefit of all the creditors, and, as far as this Court has jurisdiction, no one creditor can be allowed to have a larger share of the assets than any other creditor.

Then it is said that the assets are subject to the law of the place where they are. I quite agree that if the law of the place where they are had given a charge of that nature on the assets prior to the time when the petition for winding-up was presented, or possibly prior to the time when the winding-up order was made, and a judgment, for instance, had been put on the register, that might, by the law of *Bombay*, have constituted a charge on the property of the company, and then the trust for the benefit of the creditors would have been subject to that charge. But here there is no allegation that the judgment in *Bombay*, any more than a judgment here, simply *quâ* judgment, operates as any charge at all. It is quite clear that it does not, and that until the execution and attachment have issued and been executed, there is no actual charge on the property. That charge is subsequent to the creation

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of the trust, and is made by the particular Appellants here with full notice of the trust.

The consequence necessarily follows, that in this Court these creditors cannot be allowed by such means to obtain priority; and that they must give up, for the benefit of the creditors, what they have so obtained.

The appeal will be dismissed with costs.

Solicitors for the Appellants: Messrs. *Hollams, Son, & Coward.*

Solicitors for the Official Liquidator: Messrs. *Tilleard, Godden, & Holme.*

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[1872 V. 1.]

Securities for Bills of Exchange—Doctrine of Ex parte Waring—Unaccepted Bills—Right of Double Proof—Practice—Appeal by one of two Defendants.

R & Co., of *Brazil*, in the course of exchange operations with *A.*, of *Manchester*, drew bills on him for £2000, which they sold to the Plaintiff, and about the same date transmitted to *A.* acceptances of another house for £1900 to cover the bills drawn. Before the covering remittances reached *England*, *R. & Co.* stopped payment and presented a petition for liquidation. *A.*, being also in difficulties, refused to accept the bills drawn on him, and also became a liquidating debtor. The Plaintiff, as holder of the dishonoured bills, filed a bill against the trustees of the estates of *R. & Co.* and *A.*, praying that the remittances might be applied in payment of the bills:—

Held (reversing the decision of *Bacon*, V.C.), that the Plaintiff had no equity to support the bill.

The doctrine of *Ex parte Waring* (1) does not apply to a case where the bills drawn by one of the insolvent firms on the other have not been accepted, nor in any other case in which the holder of the bills has no right of double proof against the two firms.

Ex parte Smart (2) distinguished.

On bill by *P.* against *R.* and *A.*, who all separately claimed the same property, decree made in favour of *P.* On appeal by *A.* alone, the Court being of opinion that *R.* was entitled, dismissed the bill against both Defendants.

THIS was an appeal from a decision of Vice-Chancellor *Bacon*.

C. W. Ryder carried on business as a merchant at *Bahia* and *Pernambuco*, in *Brazil*, under the firm of *Ryder & Co.*, and at *Manchester* under the firm of *J. O. Ryder & Co.*

(1) 19 Ves. 345. (2) Law. Rep. 8 Ch. 220.

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The firm in *Brazil* had for several years been engaged in transactions on an exchange account with *F. W. Ashton*, a merchant at *Manchester*. In the course of these transactions the firm in *Brazil*, on the 29th of August, 1871, drew three bills of exchange for £800, £700, and £500 respectively, at ninety days sight, on *F. W. Ashton*, to the order of the Plaintiff, *Charles Vaughan*. These bills were all held for value by the Plaintiff.

About the same time *Ryder & Co.*, through their manager, *W. H. Wiatt*, purchased at *Bahia* two bills of exchange at ninety days sight, one drawn on the *London and Brazilian Bank* for £900, and the other on Messrs. *Saunders & Co.*, of *Liverpool*, for £1000, which they forwarded to *F. W. Ashton* on the 8th of September, 1871, with the following letter:—

"Dear Sir,—Drafts. Pray honour the following by us at 90 days' sight (viz.:)

Nos.		
3086	of *Charles Vaughan*, val. recd., *C. Vaughan & Co.* . . .	£800
3087	do. do. . . .	700
3088	do. do. . . .	500
		£2000

"Remit. To cover the above exchange operation, we enclose ninety days' sight bills.

Nos.		
1562	*London and Brazilian Bank* on *L. and B. B., London* . . .	£900
1561	*F. Saunders & Co., Charles Saunders & Co., Liverpool* . . .	1000
		£1900

"We enclose a statement of your exchange account in account current, which is now balanced up to a point.

"We remain, &c.,
"pp. *Ryder & Co.*
"*W. H. Wiatt.*"

On the 29th of August, 1871, the *Manchester* firm of *J. O. Ryder & Co.* suspended payment, and on the 22nd of September the

Brazil firm of *Ryder & Co.* also suspended payment. On the 11th of September, 1871, *C. W. Ryder* filed his petition for liquidation by arrangement, which was agreed to by the requisite majority of creditors, and the Defendant *H. W. Banner* was appointed trustee of his estate.

The three bills drawn on *F. W. Ashton* were presented to him for acceptance on the 2nd of October, 1871, but he refused to accept them.

On the 25th of October, 1871, *F. W. Ashton* presented a petition for liquidation by arrangement, and the Defendant *J. Halliday* was appointed trustee of his estate.

The two drafts for £900 and 1000, which were sent to cover the last-mentioned bills, were received by *F. W. Ashton* in due course, and given up by him to his trustee.

The Plaintiff claimed to have the proceeds of the two drafts of £900 and £1000 applied, so far as they extended, to discharge the sum due on the three bills of exchange which he had purchased of *Ryder & Co.*, and instituted this suit against *J. Halliday* and *H. W. Banner* to enforce his claim.

Both of the Defendants put in answers; the Defendant *Halliday* claiming the proceeds of the drafts as part of the estate of *F. W. Ashton*, and the Defendant *Banner* claiming them as part of the estate of *Ryder & Co.*

The Vice-Chancellor directed the drafts to be given up to the Plaintiff (1). From this decision *Halliday* appealed. The Defendant *Banner* did not join in the appeal.

(1) 1874. March 14. W.N. (1874) 70

SIR JAMES BACON, V.C.:—

Upon the face of this case there is a certain complication in the transaction which might seem to amount to difficulty; but I think the principles are so well established by decision that I do not hesitate to say that the Plaintiff is entitled to the proceeds of the remittance which he claims by this suit. Many of the facts of the case are hardly in dispute. [His Honour then referred to the facts of the case and read *Wiatt's* letter of the 8th of September, 1871.] Now what does that transaction amount to? Let us consider it first as between the remitter and the receiver of those drafts. First, there is in as plain words as our language can convey, a dedication of the remittances to cover the acceptances, and nothing else; and whatever may have been the former practice of Mr. *Ashton* as to the remittances, it cannot in the slightest degree affect this particular transaction, for here the person who draws upon him and intends to become his debtor for the amount of

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Mr. *De Gex*, Q.C., and Mr. *Winslow*, Q.C., for the Appellant:—

There is no proof of an appropriation of these drafts; the result of the evidence is that they were sent on the general account. But supposing there was an appropriation, the Plaintiff has no

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the draft sends him to cover the above exchange operation the bills for £1900. The bills arrive in *England*, they are not accepted, and what is the consequence of that? Can Mr. *Ashton*, or anybody for Mr. *Ashton*, claim to hold that remittance? Mr. *Winslow* has argued that, because of the bankruptcy or *quasi* bankruptcy, these became the property of *Ashton*. How could *Ashton* claim any property in them without performing the conditions on which they were entrusted to him? They are sent to him as a specific appropriation; they are not part of his estate, they are not vested in his liquidator or trustee, they are sent with a direction specifically to appropriate. Not only had the remitter a right by the course of the dealing, but he had the right upon the ordinary principles of debtor and creditor which every payer has. Whatever debt he or his firm might owe to *Ashton* at that time, he has a right to ascribe the £1900 of the bills to any particular portion of that debt. He had a right to say, "You shall take it in payment of that particular debt, and no other—in truth, it never became a debt for want of acceptance; and if you do not take it upon those conditions you shall not have it at all." It never was *Ashton's*; it never became *Ashton's*. It could only have been his, first, upon the conditions which are expressed, and next, upon the actual appropriation to cover the bills. That is so far the transaction between the parties originally concerned. Then it is said that the case of *Ex parte Waring* (19 Ves. 345) does not apply, and no doubt it does not apply in that particular which Mr. *De Gex* has so carefully selected from *Ex parte Waring*, because here there was no acceptance, and in *Ex parte Waring* there was; and in that case the decision was that in order to adjust or work out the equities between the parties, it was necessary to consider the bills in hand, the short bills and so on, as if they remained belonging to neither of them. To that extent the case of *Ex parte Waring* does not apply, but to the extent of saying that the equities between the parties are to be enforced when bankruptcy happens, it has a direct application, and that application has been recognised in every case which has happened since. It is not because the particular facts of this case differ in the respect which has been mentioned from that, that the universal equitable principle is not to be applied to it. Although, therefore, I do not say the decision in *Ex parte Waring* does apply to this case, I say the equitable principle upon which it is based does directly apply to it. Therefore, so far as the claim of *Ashton* is concerned, in my opinion there is not the shadow of a ground upon which it can be supported. Then comes Mr. *Banner*, and Mr. *Banner* says, "That may be all very well, decide for or against *Ashton*, yet the property belongs to me, for *Ashton* having failed to accept the bills, the remittances remained the property of the *Bahia* firm, and ought to be handed over to me as the trustee appointed in the liquidation." Trusts may be declared in a variety of ways; trusts may be inferred from the course of dealing. The history of the begin-

equity to sustain his bill. This is the first time that it has been attempted to apply the doctrine of *Ex parte Waring* (1) to a case where the bills have not been accepted. The *ratio decidendi* of *Ex parte Waring* was that there was a right of proof by the bill-

ning of the exchange transactions is stated and proved, the course of acting on it is stated and proved, the selling of bills with one hand, and the remitting to cover those bills with the other, is stated and proved, and as the result of those transactions, in my opinion, as between the Plaintiff and *Banner*, or *Ryder's* estate, there is a clear right to have this appropriation which *Wiatt* in *Bahia* directed in the first instance, and which the proceedings in bankruptcy have frustrated to the extent that it cannot be specifically performed. But does it signify that the Plaintiff, Mr. *Vaughan*, is not a party to the transaction between *Ashton* and *Ryder*? Not, in my opinion, in the slightest degree. The same principle of equity upon which *Ex parte Waring* is based, although upon facts in that case different from the present, apply directly to the present case, and I am of opinion that the case of *Ex parte Smart*, *In re Richardson* (Law Rep. 8 Ch. 220) removes the apparent difficulty which might exist by the circumstance of the Plaintiff in this case not being a party to the bill transactions, in respect of which bill transactions the remittance was made, and which being made for a specific purpose was held there to be applicable to the specific purpose contracted for between the parties: *Ex parte Smart*, *In re Richardson*, was this: The persons who claimed were no parties to the bill. They had drawn on *Richardson*, and *Richardson* had transactions with *Stephani*, with whom also *Smart* had transactions, and *Stephani* transmitted bills to *Richardson* for the purpose of meeting the existing acceptances, the benefit of which acceptances—I say nothing about the form of them—belonged to the claimant there. It appeared to me that upon the principle of *Ex parte Waring* he was right in that claim. I seem to have said on that occasion that the proceeds of the remittances, so far as they existed in specie at the date of the liquidation, should be applied for the purposes for which they were remitted, as expressed in the letters referred to in the evidence, and that an inquiry should be made for the purpose of ascertaining who were the people entitled to the proceeds. Now, when that came to be decided in the Court of Appeal, the Lord Justice *James* disposes of the point of the bills being drawn, and says, "*Richardson* would have received bills sent to him for the specific purpose of meeting bills being drawn upon him, and to become due on that particular day, and if *Stephani & Co.* had heard that *Richardson* was becoming bankrupt in time to prevent the remitted bills from being issued, they would have been entitled to file a bill to say that they were sent for the purpose of taking up particular bills, and this would have been quite independent of the taking of any accounts between them and *Richardson*." Then, further, he says, "That being so, the question arises, in the second place, whether this state of circumstances is not precisely the same as in *Ex parte Waring* and *Powles*

(1) 19 Ves. 345.

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holder both against the drawer and acceptor of the bills, and the principle was resorted to in order to adjust the equities between the two insolvent estates. But here there is no such double right of proof, and there are no equities to adjust. It is simply a case of mortgagee and mortgagor, and whatever may be the rights of the two co-Defendants, *Halliday* and *Banner*, *inter se*, the Plaintiff has nothing to do with them.

Mr. *Kay*, Q.C., and Mr. *H. A. Giffard*, for the Plaintiff:—

The letter of the 8th of September, 1871, proves that the drafts were distinctly appropriated to cover the bills sent for

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v. *Hargreaves* (3 D. M. & G. 430), and whether we ought not to come to the same conclusion as in those cases. *Stephani & Co.* had a right to say that the bills should not be applied for the general purpose of paying *Richardson's* creditors, but for the specific purpose for which they were intended; and, on the other hand, they had no right to leave *Richardson's* estate liable to pay his acceptances. Accidentally, another person gets an advantage for which he had not stipulated, by reason of the adjustment of equities between the parties." Then His Lordship says: "It is said that we ought not to extend the doctrine of *Ex parte Waring*, but the rule laid down in that case has been often before the Court, and neither the Court nor the Legislature has shewn any disapproval of it. We are not really pressing it further. I cannot follow the argument that has been urged upon us, that the doctrine only applies where all parties are parties to the same bills, and does not apply to a case where there are distinct contracts." The contract between the parties, in my opinion, is evidenced by the course of dealings. That course of dealings did give to the Plaintiff in this suit an interest in and a right to see to the application of the remittances, although the particular fact of the remittances was not known to him at the time they were made. I think nothing that has been done has impaired that right. When the remittances came to this country accompanying the bills, the bills, for a very good reason, are not accepted by Mr. *Ashton*. The consequence of that is that the remittances stand in the same state as if they had not been made, with this one exception, that they are earmarked by a declaration in writing that those remittances are to be applied to meet those particular bills. That, in my opinion, gives to the Plaintiff the right which he claims in this suit, and I think he is entitled to the relief he seeks. There will, therefore, be a declaration that, by virtue of the course of dealing between the parties and the letter, the two remittances were specifically appropriated to meet the three drafts, and that the remittances ought to be applied in satisfaction of the sums which shall be found due to the Plaintiff in respect of the same three drafts, without prejudice to his right to prove against the estate of Messrs. *Ryder & Co.* in respect of the three drafts, after the remittances shall have been so applied. Under the circumstances, there will be no order as to costs.

(1) 17 Jur. 1083

acceptance. That being so, the principle of *Ex parte Waring* (1) applies. The fact that the bills were not accepted makes no difference. *Trimingham* v. *Maud* (2) is precisely in point. *Ashton's* non-fulfilment of his obligation renders it inequitable that his estate should retain the securities, and *Ryder & Co.'s* estate cannot retain them as against us if they are given up to it. Indeed their trustee, *Banner*, does not claim them, for he does not appeal from the Vice-Chancellor's decision. It makes no difference that we have no privity with *Ashton*. We stand upon the equity of the drawers. *Ashton* was the principal debtor; he induced *Ryder & Co.* to draw the bills, and the securities ought to be appropriated to clear *Ryder & Co.'s* estate from the liability: *Powles* v. *Hargreaves* (3); *City Bank* v. *Luckie* (4); *Banner* v. *Johnston* (5); *Thomson* v. *Simpson* (6); *Ex parte Smart* (7).

SIR W. M. JAMES, L.J.:—

The principle of *Ex parte Waring* applies where there are equities to adjust between two parties who become insolvent, and the adjustment of which equities, by a piece of good luck, so far as a third party is concerned, operates for the benefit of such third party. The simple answer to this case is, that there are no equities whatever to adjust. If the Plaintiff is right as to the appropriation, the *Bahia* house is, irrespective of any equities to be adjusted and any questions whatever, entitled absolutely and simply to the return of the remittances. If he is not right in that, he has no foundation whatever for his case.

SIR G. MELLISH, L.J.:—

The Vice-Chancellor in this case came to the conclusion, and I am of opinion correctly, that there was a specific appropriation of the remittances; and it appears to me utterly impossible to put any construction on the letter which accompanied the remittances except that the bills remitted were specifically appropriated to

(1) 19 Ves. 345.
(2) Law Rep. 7 Eq. 201.
(3) 3 D. M. & G. 430.
(4) Law Rep. 5 Ch. 773.
(5) Ibid. 5 H. L. 157.
(6) Ibid. 5 Ch. 659
(7) Law Rep. 8 Ch. 220.

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take up the acceptances, if *Ashton* did accept them. Then the rule of law is applicable, that if a remittance is sent for a particular purpose, whether it be a remittance by bill or a remittance in money, the person who receives the remittance must either apply it for the purpose for which it was sent, or else return it. Therefore, as soon as *Ashton* determined not to accept the bills he was bound to return the remittances. He has incurred no liability, and I cannot see how *Ex parte Waring* (1) can possibly apply. The simple case is, that the Plaintiff has purchased bills from a firm which has become insolvent without getting any security whatever, and therefore his only remedy is to prove upon those bills. The firm of *Ryder & Co.* are, it appears to me on this state of facts, entitled to have the remittances returned to them; but if they are not entitled to have the remittances returned to them, I have great difficulty in thinking that there can be any case to which the doctrine of *Ex parte Waring* can apply, unless there is not only a double insolvency, but a right of double proof on the part of the holders of the bills who claim the equity. The only case on which the Vice-Chancellor relied was a case before us of *Ex parte Smart* (2), and it is true that in that case we did in one respect carry the doctrine of *Ex parte Waring* further than it had been carried in any previous case; for I think that in all the previous cases the claim had been by a holder of a bill who had a right of double proof against the acceptors and the drawers. In *Ex parte Smart* the holder was himself the drawer, and although he was not entitled to prove on the bill against the two firms, he was entitled to prove against the acceptor, who had accepted for the accommodation of a firm to whom the drawer of the bill had sold goods, and he was entitled to prove for the same debt against that firm for goods sold and delivered. There being, therefore, a double insolvency and a double right of proof, we thought that the principle of *Ex parte Waring* applied. But where there is no right of double proof, whatever may be the equities as between the two firms that are insolvent, I cannot see how there can be any difficulty in settling those equities between the parties without the necessity of giving to the bill-holder, who is simply a creditor without any security, that security which he has never bargained for.

(1) 19 Ves. 345. (2) Law Rep. 8 Ch. 220.

I am of opinion, therefore, that this bill ought to have been dismissed with costs.

SIR W. M. JAMES, L.J.:—

I desire, with reference to what the Lord Justice has just said, which I did not say before, to express my entire concurrence in his observations, that the right of proof against both estates in respect of the same matter is essential to the application of *Ex parte Waring* (1). We simply dismiss the bill with costs against everybody.

Solicitors for the Plaintiff: Messrs. *Phelps & Sidgwick*, agents for Messrs. *Sale & Co., Manchester.*

Solicitors for the Defendants: Messrs. *Clarke, Woodcock, & Ryland*, agents for Messrs. *Brooks, Marshall, & Brooks, Manchester;* Messrs. *Chester, Urquhart, & Co.*, agents for Messrs. *Laces, Banner, & Co., Liverpool.*

REPUBLIC OF LIBERIA *v.* IMPERIAL BANK.

[1871 L. 168.]

Affidavit as to Documents—Time—Bill Dismissed.

Where a Plaintiff, after an order for the production of documents, persisted in not filing a sufficient affidavit as to documents, the Court fixed a time at which the bill should, in default of a sufficient affidavit, stand dismissed, and the money in Court be repaid to the Defendant who paid it in.

Order of *Malins*, V.C., affirmed.

Affirmed by H. of L. 10 App. Cas. 139.

THE bill in this suit was, on the 6th of December, 1871, filed by the Republic of *Liberia* against the *Imperial Bank* and the *Commercial Bank of Liverpool* as stakeholders, and against several persons, one of whom was *E. F. Roye* (son and administrator of *E. J. Roye*, formerly President of the Republic), and related to the proceeds of a loan of £100,000 to the Republic; and the bill prayed (amongst other things) relief respecting a sum of £4000, part of the proceeds of the loan, then standing to the credit of *E. J. Roye* with the *Commercial Bank of Liverpool.*

(1) 19 Ves. 345.

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Under an order made in the suit, the £4000 was brought into Court.

By an order made on the 31st of May, 1873, upon the application of *E. F. Roye*, the Plaintiffs were ordered to file the usual affidavit as to documents, as reported (1). The Plaintiffs filed a very long affidavit as to documents, made by the Attorney-General of the Republic, but this affidavit was admitted to be insufficient, and on the 23rd of April, 1874, the Vice-Chancellor *Malins*, on the motion of the Defendant *Roye*, made an order that, in default of the Plaintiffs filing a sufficient affidavit of documents on or before the 12th of July, the bill do stand dismissed with costs, and the £4000 be paid out to the Defendant *Roye*.

The Plaintiffs, on the 1st of June, 1874, filed a further affidavit, also insufficient, and on the 2nd of July they moved before the Vice-Chancellor *Malins* that the order of the 23rd of April should be discharged; but His Honour did not think it fit to hear the motion, considering that the application ought to be made to the Court of Appeal.

Mr. *Glasse*, Q.C., and Mr. *B. B. Rogers*, now moved accordingly:—

We ought to be allowed an opportunity of filing a better affidavit. Our difficulties are very great, as there is neither solicitor nor notary in *Liberia*, and the documents there are all public, and cannot be brought here. We admit that we are in default, and we must submit to terms, but all we ask is, that the bill may not be dismissed, and the money may not be paid to this Defendant, who has no right to it. No such order was ever made. *Princess of Wales* v. *Earl of Liverpool* (2) was quite different.

Mr. *Higgins*, Q.C., and Mr. *Langley*, for the Defendant, cited *United States* v. *Wagner* (3).

Mr. *B. B. Rogers*, in reply, asked to have the cause set down on bill and answer in preference to having it dismissed.

(1) Law Rep. 16 Eq. 179. (2) 3 Sw. 567.
(3) Law Rep. 2 Ch. 582.

SIR W. M. JAMES, L.J.:—

I am of opinion that the Vice-Chancellor was, under the circumstances, perfectly warranted by all the principles of the Court in making the order.

It was said that there was no precedent for making such an order. But it is obvious that such an order must be within the power of the Court, and, indeed, it was admitted by the Plaintiffs' counsel that, if a Plaintiff persisted in refusing to make the discovery required of him, he could not keep the suit pending for all time over the Defendant, and that there must come a time at which the Defendant must be allowed to be freed, and must no longer be kept before the Court at the will of a recalcitrant Plaintiff.

The Vice-Chancellor has had this matter before him repeatedly, and, after making various orders, has fixed a time when the bill shall be dismissed if a proper affidavit of documents is not made. The money was standing years ago to the credit of this Defendant, and the Vice-Chancellor has decided that unless the affidavit is filed the money shall be paid back to him; and my opinion is that His Honour was well warranted in exercising his judicial discretion so as to fix a time.

It has, however, been stated to us that a mail may be expected to arrive from *Liberia* about the 14th of July, and as that mail may possibly bring the document which ought to have been put in long ago, we propose to enlarge the time fixed by the Vice-Chancellor till the 28th of July. The Plaintiffs must, however, within fourteen days, pay the costs of this application, which (subject to taxation) we assess at £75. If they do not pay them, there will be no alteration in the Vice-Chancellor's order.

SIR G. MELLISH, L.J., concurred.

Solicitor for the Plaintiff: Mr. *E. Smith.*
Solicitors for the Defendant: Messrs. *Flux & Co.*

L. JJ.
1874
April 24.

In re SIMPSON.

Partnership—Joint and Separate Estate—Death of Partner—Bankruptcy of Survivors.

Four persons carried on a business in partnership under a deed which provided that the death of a partner should not dissolve the partnership, but that the business should be carried on by the survivors or survivor, and the share of the deceased partner ascertained at the next half-yearly stock-taking, and paid to his representatives by instalments. Two of the partners died, and afterwards the survivors became bankrupt. No steps had then been taken to ascertain the shares of the deceased partners:—

Held (affirming the decision of the Chief Judge), that the creditors of the four partners had no right to have the joint assets of the four which remained *in specie* applied first in payment of their debts.

Ex parte Morley (1) distinguished.

WALTER SIMPSON, *Charles John Simpson*, *Frederic Simpson*, and *Arthur Simpson*, carried on in partnership at *Preston* the business of cotton-spinners, under the provisions of articles of partnership, dated the 2nd of January, 1871. By these articles it was provided that the partnership should continue for fourteen years from the 1st of July, 1867, and each partner was to be entitled to an equal fourth part of the profits, and half-yearly general accounts were to be taken.

It was further provided that, "in case of the death of either or any of them the said *C. J. Simpson*, *A. Simpson*, *W. Simpson*, and *F. Simpson*, such event shall not dissolve the partnership, but the survivors or survivor of them shall carry on the business, and the share of either or any of them so dying shall be ascertained at the succeeding stock-taking after the death of either of them and the balance then found to be due to either or any of them the said *C. J. Simpson*, *A. Simpson*, *W. Simpson*, and *F. Simpson*, so dying as aforesaid, shall (subject as hereinafter mentioned) as to one half part thereof (except as to the sum of £200) remain in the hands of the survivors or survivor of them the said *C. J. Simpson*, *A. Simpson*, *W. Simpson*, and *F. Simpson*, for three years from the decease of either of them, and as to the other half part thereof (except as to the said sum of £200) remain in the hands of the

(1) Law Rep. 8 Ch. 1026.

survivors or survivor of them the said *C. J. Simpson, A. Simpson, W. Simpson,* and *F. Simpson,* for five years from the decease of either of them, and the whole of the said balance (except as to the said sum of £200) shall be secured to the representatives of either or any of them the said *C. J. Simpson, A. Simpson, W. Simpson,* and *F. Simpson,* so dying as aforesaid, by the promissory notes of the survivors or survivor of them the said *C. J. Simpson, A. Simpson, W. Simpson,* and *F. Simpson,* such notes bearing interest at the rate of 7½ per cent. per annum, payable and to be paid to such representatives quarterly, and the said sum of £200 shall be paid to the representatives of each of them the said *C. J. Simpson, A. Simpson, W. Simpson,* and *F. Simpson,* dying as aforesaid, within one calendar month after the death of either of them."

The capital of the business consisted of money, machinery, and stock. On the 27th of September, 1871, *Arthur Simpson* died, and the business was thenceforth carried on by the three survivors. On the 15th of January, 1872, *C. J. Simpson* died, and thenceforth the business was carried on by the two survivors. No half-yearly accounts had been taken, and no steps were taken to ascertain the shares of the deceased partners. No promissory note was given by the survivors to the representatives of either of the deceased partners, nor was the £200 in either case paid within the period fixed by the articles. Small sums were, however, from time to time paid by the survivors to the widow of each of the deceased partners, amounting in the case of *A. Simpson's* widow to £248, and in the case of *C. J. Simpson's* widow to £60.

On the 19th of December, 1872, the two survivors, *W. Simpson* and *F. Simpson,* filed a liquidation petition, under which a trustee was afterwards appointed. At the commencement of the liquidation the debts of the firm amounted to £43,627, of which £23,873 consisted of debts which had been contracted when all the four partners were living. The creditors of the four original partners claimed to have the machinery, or so much thereof as could be distinguished as having belonged to the partnership of the four, applied in payment of their debts, in priority to the creditors of the three and of the two. This claim was disputed by the creditors of the three and of the two, and a special case was stated for the purpose of having this question determined.

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The Judge of the County Court of *Manchester* decided that the creditors of the four were entitled to the priority which they claimed; and he directed an inquiry to ascertain what part of the machinery could, at the date of the liquidation petition, be distinguished as having belonged to the four partners.

The creditors of the two surviving partners appealed, and the Chief Judge *Bacon* decided that the creditors of the four partners had no priority (1).

The creditors of the four original partners appealed.

(1) 1874. March 9. WN(1874)66

SIR JAMES BACON, C.J.:—

I am of opinion that there is no foundation for the contention which has been raised upon this special case. A partnership was formed; two of the partners died successively; the other two continued to carry on the business, not only ostensibly and being in actual possession of the partnership assets, but being entitled to the enjoyment of those assets under the terms of the partnership articles, which stipulate that the death of a partner shall not dissolve the partnership, and contain all other provisions necessary for the carrying on of the business. Under those circumstances the joint creditors of the four have these rights—they may sue the representatives of the deceased partners, and they may sue the continuing partners. But what possible right can any creditors of the four or of the three have to come and lay their hands on any particular assets, and say they are to be primarily applied in discharge of their debts? There is no authority for such a proposition in any of the cases which have been cited; in *Ex parte Morley* (Law Rep. 8 Ch. 1026) least of all, because there the partner who died had provided by his will that a certain portion of his property should be left in the business, which was to be carried on after his death. His son did carry it on and became bankrupt, and it was of necessity, as well as of right, that there should be an account of the debts due in respect of the business in which the testator had employed his property, and another account of those debts for which the son only was liable. The facts stated in this special case are distinct. The representatives of the two dying partners made no claim against the assets, but were content with the stipulations of the partnership deed, and whether anything, much or little, was paid to them was their affair. Claim to the partnership assets they could have none till the joint debts were all paid. When the bankruptcy happens this is found to be the case—the continuing partners, who are liable for every shilling of the joint debts of the four, as well as for their own debts, are found in possession of these particular chattels, and of all the other things which constitute what the deed calls partnership property. The only proper and just way of administering that estate is to treat the creditors of the four just as the creditors of the two, that is, as if they had all proved their claims under the bankruptcy, and as entitled to have the assets of the two (including that which they derived by contract with the deceased partners) applied rateably in payment of their debts. There is no principle, and certainly no authority has been

Mr. *De Gex*, Q.C., and Mr. *North*, for the Appellants:—

The creditors have all the rights of the partners, and under the articles of partnership the representatives of the partners had a right to their share of the assets and profits, and that right now goes to creditors. *Ex parte Morley* (1) is very similar: *Ex parte Peake* (2). No accounts had been taken; the estates continued separate.

Mr. *Marten*, Q.C., and Mr. *Ambrose*, for the Respondents, were not called upon.

SIR W. M. JAMES, L.J.:—

I am of opinion that the decision of the Chief Judge is quite right, and I agree with the judgment he pronounced.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

The question is really whether, according to the true construction of the articles of partnership, the interest of the deceased in the assets is not to pass immediately on the death of one of the partners. I am of opinion that it is. The articles say, that in case of the death of any of the partners, such event shall not dissolve the partnership; that is to say, the survivors are to continue to be partners *inter se*. It clearly does not mean that the executors are to be partners, but that the survivors shall continue to be partners, and may deal with the assets in any way they please—not for the purpose of winding up, as they must have done in the ordinary case—but they may go on dealing with the assets for the purpose of the continuing business. And the share of the partner

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referred to which can justify me in saying that there is any principle upon which, two years after the death of the last surviving partner, persons who are creditors of the four can say, "Pick us out this and that asset which was in existence at the time of the partnership between the four." There is no foundation for the contention raised by the special case. The order of the County Court will be varied by answering the question raised by the special case in the negative. The costs of all parties will be paid out of the estate.

(1) Law Rep. 8 Ch. 1026.

(2) 1 Madd. 346.

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dying is to be ascertained at the succeeding stock-taking after the death, and the balance then found to be due is to be paid in a particular way. That clearly shews that what is meant by "the share" is the sum to be paid to the executors in respect of the share of the deceased. The construction seems to me to be made still more clear by the subsequent part—that £200, part of the purchase-money, is to be paid one month after the decease, whether the stock-taking is made or not.

I am of opinion that the whole interest in the assets passed immediately on the death of one partner to the survivors, and the right of the executors was to have the value ascertained in a particular way, and then to receive the amount in a particular way. I am also of opinion that the ascertaining of the value was not a condition precedent to the passing of the property in the assets, and that the assets went to the surviving partners.

The appeal must be dismissed.

Solicitors for the Appellants: Messrs. *Gregory, Rowcliffes, & Rawle*, agents for Messrs. *Cooper & Sons, Manchester.*

Solicitors for the Respondents: Messrs. *Pritchard, Englefield, & Co.*, agents for Messrs. *Boote & Edgar, Manchester.*

L. JJ. 1874 *May* 1, 8.

Ex parte BARCLAY. *In re* JOYCE.

Bankruptcy—Bills of Sale Act (17 & 18 *Vict. c.* 36)*—Registration—Trade Fixtures—Mortgage by Underlease—Power of Sale.*

4 Ch D 506-7-8

5 Ch D 564

7 Ch D 142

14 Ch D 385

J., the lessee of a public-house and two cottages, who was bound by the covenants of his lease to deliver up, at the expiration of the term, all fixtures, except trade fixtures, demised by way of mortgage the public-house and premises, including all the tenant's fixtures, to a mortgagee for all the residue of the term except the last three days. The deed contained a power to the mortgagee, in case of default, to sell the premises or any part thereof either together or in parcels, and either for the term thereby granted or for the original term, with a declaration that in case of a sale the mortgagor should hold the last three days of the term in trust for the purchaser. *J.* filed a petition for liquidation, and a trustee was appointed:—

Held, that the mortgage deed gave no power to the mortgagee to sell

or take possession of the fixtures separately from the buildings, and that therefore it did not require to be registered under the *Bills of Sale Act.*

The true test whether a mortgage deed of a building and fixtures requires registration under the *Bills of Sale Act* as respects the fixtures, is, whether it gives power to the mortgagee to sell or take possession of the fixtures separately from the building.

Ex parte Daglish (1) distinguished.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, sitting as Chief Judge.

By an indenture of lease dated the 15th of June, 1859, Mr. *J. McLeod More* demised a freehold public-house at *Plaistow*, in the county of *Essex*, called the *Bell and Anchor*, with the yard, outbuildings, and appurtenances thereunto belonging, to Mr. *Richard Norden*, his executors, administrators, and assigns, for the term of fifty years from the 25th of June, 1859, at the yearly rent of £200. The indenture contained, among other covenants, a covenant by the lessee that he, his executors, administrators or assigns, would, at the expiration or other sooner determination of the term, peaceably and quietly yield up the said messuage, outbuildings and premises, together with all doors, wainscots, shelves, dressers, drawers, locks, keys, bolts, bars, staples, hinges, hearths, chimney-pieces, chimney jambs and slabs, windows, sashes, shutters, partitions, sinks, pumps, wells, drains, cesspools, cisterns, and all things which then were or which at any time during the said term should be fixed or fastened to or set up in or upon the said premises or any part thereof or belonging thereto, unto the said *J. McLeod More*, his heirs and assigns (tenant's fixtures put up for trade excepted). The lessee also covenanted that he and his executors, administrators, and assigns would, during the term, keep open and use the messuage as a public-house, and use his and their best endeavours to obtain the necessary license for so doing.

Two small cottages were afterwards erected on part of the demised premises.

The lessee put up various trade fixtures for the purposes of his business as a publican, besides other ordinary tenant's fixtures.

On the 2nd of September, 1863, *R. Norden*, by indenture of

(1) Law Rep. 8 Ch. 1072.

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that date, assigned the public-house, cottages, and premises to *John Joyce*, his executors, administrators, and assigns, for all the residue of the term of fifty years.

J. Joyce borrowed the sum of £3000 from Messrs. *Barclay, Perkins, & Bevan*, and by an indenture of even date with the last-mentioned indenture he demised to them the said premises under the description of "the said messuage or tenement, public-house and premises demised by the hereinbefore recited indenture of lease, and also the said two cottages or tenements and other buildings, with their appurtenances, including therein all and every the tenant's fixtures in, upon, or about the premises hereby demised," for all the residue of the said term of fifty years except the last three days thereof, at the yearly rent of a peppercorn, subject to a proviso for redemption on repayment of the sum of £3000 and interest. The indenture contained a power to the mortgagees, in case of default in repayment of the mortgage debt, to sell and absolutely dispose of the said premises thereby demised, or any part thereof, either for the term thereby granted or for the whole term granted by the said indenture of lease, and either together or in parcels, and to hold the purchase-money upon the usual trusts. And it was thereby declared that after any such sale or sales the said *J. Joyce*, his executors, administrators, and assigns, should stand possessed of and interested in the last three days of the original term of fifty years, in trust for the purchaser or purchasers of the premises which should have been sold or disposed of as aforesaid, and should assign such last three days as such purchaser or purchasers should direct or require.

On the 1st of November, 1873, *Joyce* presented a petition for liquidation by arrangement, which was agreed to by the requisite majority of his creditors, and a trustee was appointed of his estate.

On the 6th of January, 1874, Messrs. *Barclay & Co.* signed an agreement, whereby they sold the public-house, with the two cottages and other buildings, for the remainder of the term of fifty years to *J. Emms*, who agreed to take and pay for, at a valuation, such part of the household furniture, fixtures, and other effects that were then on the premises, as the vendors or the trustee of the property of *J. Joyce* might be disposed or have a right to sell.

An inventory was accordingly made of the trade fixtures and other tenant's fixtures in the public-house and cottages, which were valued at £170. The trustee contended that the mortgagees had no right to the value of any of the fixtures, on the ground that the mortgage deed was not registered under the *Bills of Sale Act* (17 & 18 Vict. c. 36). The money was accordingly paid into Court, and on the 12th of March, 1874, Messrs. *Barclay* applied to the Registrar, sitting as Chief Judge, for a declaration that the tenant's fixtures comprised in the inventory formed part of their security, and for an order for the trustee to pay them the value of such fixtures.

The Registrar dismissed the application with costs, being of opinion that the case was governed by the decision in *Ex parte Daglish* (1).

From this decision Messrs. *Barclay* appealed.

Mr. *Winslow*, Q.C., Mr. *Bardswell*, and Mr. *R. E. Webster*, for the Appellants:—

The Registrar considered that this case was identical with *Ex parte Daglish*, but in truth it is very different. In that case the trade fixtures were treated as chattels, which might be sold separately from the building; here the mortgagees can only use or sell the fixtures as part of the building. That is the true test whether a mortgage of fixtures is a bill of sale requiring registration or not, namely, whether the assignor, be he freeholder or termor—for there is no difference in this respect—treats them as chattels, or as attached to the building: *Waterfall* v. *Penistone* (2); *Hawtry* v. *Butlin* (3); *Tebb* v. *Hodge* (4). In the present case the ordinary tenant's fixtures cannot be removed at all, for they are to be given up to the landlord at the expiration of the original lease, and both they and the trade fixtures were only demised to the mortgagees. The power of sale can make no difference, for even then the property is sold for the whole of the original term. The mortgagees have no power to dismantle the property, and sell the fixtures apart from the building. If the debtor had merely deposited his lease without any memorandum of mortgage, the mortgagees

(1) Law Rep. 8 Ch. 1072.
(2) 6 E. & B. 876.
(3) Law Rep. 8 Q. B. 290.
(4) Ibid. 5 C. P. 73.

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might have come to this Court to enforce it, and the Court would have directed that they had a charge on both building and fixtures. Can they have a less right because they have taken a legal mortgage?

Mr. *Roxburgh*, Q.C., and Mr. *Finlay Knight*, for the trustee:—

With respect to the ordinary tenant's fixtures, it is doubtful, upon the construction of the original lease, to whom they will belong at the end of the term, and if the Court decides in favour of the mortgagees, some subsequent inquiries may be necessary. But as to the trade fixtures, which belonged absolutely to the lessee, we contend that this mortgage comes within the *Bills of Sale Act*, and ought to have been registered under the authority of *Ex parte Daglish* (1). There is no real distinction between the two cases. There is a power of sale in this mortgage, not only for the derivative but for the original term, and the mortgagees had power to dispose of the trade fixtures as absolutely as in *Ex parte Daglish*; for the property, "or any part thereof," may be sold "either together or in parcels," and the mortgagor is to hold the last three days of the original term in trust for the purchaser.

SIR W. M. JAMES, L.J.:—

I am of opinion that the Registrar's decision in this case cannot be affirmed, although I am not at all surprised at the Registrar's considering himself bound by the decision said to have been come to by us in *Ex parte Daglish*. There is a thin but substantial distinction between the two cases.

Now the question here is, whether there really has been any separate sale of the fixtures, or any separate license or authority to take the fixtures and to sell them. I am of opinion that there has not. The mortgage was by way of underlease. If there is an underlease of property, including the fixtures upon it (and they would of course be included, whether expressed or not), it appears to me that the right of the underlessee to the enjoyment of the property during the term in the state in which it was demised to him, is absolute. Whoever enjoys the term will have the enjoy-

(1) Law Rep. 8 Ch. 1072.

ment of all that belongs to the term. In this case, what is it that the mortgagees get? They get the whole original term except the three last days, with a power of sale of the property during the derivative term—a power of sale of the property or any part thereof, and either together or in parcels, as Mr. *Roxburgh* has pointed out to us. At first sight there is a difficulty in that form of the power; but it appears to me that the difficulty can be got over, because this was a sort of property which might be sold in parcels. Besides the leasehold public-house, there were two cottages, and undoubtedly the cottages might be sold separately from the public-house. But I do not think that, under the power to sell the chattels as fixtures, the mortgagees would have a right to go in and dismantle the house, and take away the fixtures, and sever them from the property. That would not be the natural or proper mode of executing the power of sale. They would only have a right to sell that which appertained to the term. In this case apparently the whole of the fixtures have been estimated at their full value, as if they passed absolutely and not during the term. A valuation of such articles for a term of fifty years is substantially the same thing as a valuation of them for ever, and the person who takes to them is the person who takes the term. I am of opinion, therefore, that the fixtures passed really to the mortgagees by reason of the sale of the term to them by the debtor, which he had a right to sell, and that the trustee would have had no right, if the mortgagees had remained in possession, to go in and interfere with their enjoyment because the fixtures were a part of the term.

Then the question is, whether that is at all affected by the fact that the mortgagees have not only a right to sell during the term, but that the original mortgagor is to be a trustee of the excepted three days for the purchaser. I am of opinion that that does not at all affect the question, because the term for which he was to be a trustee, namely, the three days, would be in the trustee of that term for the benefit of the owner of the derivative term, and not the owner of anything treated as separate property. On the whole, it seems to me that the framer of this mortgage deed has contrived to give a sufficient security to the brewers without being touched by the *Bills of Sale Act.*

L. JJ. 1874 *Ex parte* BARCLAY. *In re* JOYCE.

SIR G. MELLISH, L.J.:—

I am of the same opinion. I think that when a lessee who has put in trade fixtures, and is, according to the ordinary law, entitled to remove those fixtures as against his landlord, mortgages the premises with the fixtures upon them, the test whether the mortgage, so far as respects the fixtures, requires to be registered under the *Bills of Sale Act*, is whether he gives power to the mortgagee to sever the fixtures from the premises, and to deal with them and sell them separately. If he does, then I am of opinion, as we decided in *Ex parte Daglish* (1), that, so far as respects the fixtures, the instrument requires to be registered under the *Bills of Sale Act*.

It had been decided in *Hawtry* v. *Butlin* (2), affirming the decision of Vice-Chancellor *Malins* in *Begbie* v. *Fenwick* (3), that where a lessee makes a mortgage by way of underlease, and then by a separate *testatum* assigns the fixtures, the assignment of the fixtures is a bill of sale under the *Bills of Sale Act*. In *Ex parte Daglish* we carried the principle of that decision one step further, because in that case the premises only were demised; but then the power of sale, according to what we considered was its true construction, enabled the mortgagee, if he pleased, to take possession of the premises with the fixtures, and to sever the fixtures from the premises, and sell the fixtures separately, and then although it might be said that there was no assignment of the fixtures in that case, yet there was, as we thought, a power to take possession of them as security for the debt; and by the express provisions of the *Bills of Sale Act*, the power to take possession of "personal chattels," which is construed to include fixtures, as a security for a debt, is to be considered a bill of sale within the *Bills of Sale Act*. But in the present case I am of opinion that, according to the true construction of this mortgage deed, the mortgagees had no power to sever the fixtures from the premises and to sell them separately, but could only sell the premises with the fixtures upon them. I agree that the words, "to sell the same either together or in parcels," only refer to the distinction between the public-house and the cottages, and were

(1) Law Rep. 8 Ch. 1072. (2) Law Rep. 8 Q. B. 290.
(3) Law Rep. 8 Ch. 1075, n.

not intended to enable the fixtures to be sold separately from the premises.

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It is said that this deed is against the policy of the *Bills of Sale Act*, but the only question is, whether it violates the provisions of that Act. In my opinion it does not, and therefore that the judgment of the Registrar must be reversed.

Solicitors for the Appellants: Messrs. *Marson & Dadley.*
Solicitor for the Respondent: Mr. *E. J. Layton.*

Ex parte BROWNING. *In re* MARKS.

L. JJ. 1874 May 8.

Bankruptcy—Liquidation by Arrangement—Resolution of Creditors—Clause authorizing Trustee to agree to a Composition—Bankruptcy Act, 1869, *ss.* 20, 127.

A debtor, partner in a firm, having filed a petition for liquidation by arrangement, a general meeting of his creditors was held, at which the requisite majority of his joint and separate creditors passed a resolution agreeing to the liquidation, appointing a trustee and committee of inspection, and granting the debtor his discharge. The resolution also contained a clause authorizing the trustee to sell to the mother of the debtor his reversionary interest under his father's will at such a price as would pay the costs of the liquidation and a composition of 1*s.* in the pound to his separate creditors. This resolution was registered:—

Held, that the clause authorizing the trustee to sell the reversionary interest was *ultrà vires* and void; but that the rest of the resolutions were not thereby rendered invalid, and that the liquidation must proceed in the ordinary course.

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, sitting as Chief Judge in Bankruptcy.

Kaufman Israel Marks filed a petition for liquidation on the 22nd of November, 1873.

At that time he was in partnership in business at *Greenwich* with his brother, and had both joint and separate debts. His only separate creditors were his mother, Mrs. *Marks*, and the Appellants, Mr. *Browning* and Messrs. *Manners Sutton & Graham.*

The first meeting of creditors was held on the 15th of December, 1873, at which the following resolution was carried:—

"1. That the affairs of the said *K. I. Marks* shall be liquidated by arrangement and not in bankruptcy.

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In re MABES.

"2. That Mr. *T. F. Carter* be appointed trustee.

"3. That Mr. *C. C. Turnbull* and Mr. *H. Myers* be appointed a committee of inspection.

"4. That the trustee be authorized to sell to the mother of the debtor his reversionary interest under his father's will for such a sum as will pay the costs and expenses of the liquidation and a composition of 1*s.* in the pound to all the separate creditors of the said *K. I. Marks*, other than her claim against the debtor separately.

"5. That the discharge of the said *K. I. Marks* be and is hereby granted forthwith.

"6. That Messrs. *Spyer & Son* be entrusted with the negotiation of this special resolution, and it is hereby directed that the proceedings in this matter be transferred to the *London* Bankruptcy Court."

The resolution was registered without objection on the 20th of December, 1873.

This resolution was signed by Mrs. *Marks* and by some of the joint creditors, forming a sufficient majority of the joint and separate creditors; but the Appellants, Mr. *Browning* and Messrs. *Manners Sutton & Graham*, did not sign it.

Mrs. *Marks* was a creditor to the amount of about £3000; the Appellants' debts did not together exceed £142.

The whole of the separate estate of the debtor consisted of a reversionary interest in property, of which Mrs. *Marks* was tenant for life. The composition of 1*s.* in the pound on his separate debts, other than that due to his mother, would amount to £178 16*s.*, which, it was alleged by the Appellants, was far under the real value of his reversion.

The Appellants, considering the resolution invalid, brought actions against the debtor for their respective debts, which were stayed by an injunction obtained by the trustee.

The Appellants then moved before the Registrar for a declaration that the whole resolution was invalid on the ground of fraud, and was not binding on the separate creditors; and that the 4th clause of the resolution was *ultrà vires*, and passed in fraud of the separate creditors; and that the resolution might be taken off the file of proceedings; and that the proceedings might be remitted to the *Greenwich* County Court.

The Registrar refused the application, and Mr. *Browning* and Messrs. *Manners Sutton & Graham* appealed from this decision.

Mr. *De Gex*, Q.C., and Mr. *Cooper Willis*, for the Appellants:—

The 4th clause in the resolution is *ultrà vires* and void. The creditors had no power at that meeting to pass any resolution respecting the administration of the estate by the trustee. This could only be done at meetings of the separate creditors summoned for that purpose under the 20th section of the *Bankruptcy Act*, 1869. The first meeting was attended by the joint creditors as well as the separate, who had nothing to do with the administration of the separate estate. This clause was, in fact, a resolution for a composition, which was inconsistent with the resolution for liquidation: *Ex parte Lovering* (1). All the clauses of the resolution constitute the resolution, and if one clause is void the whole is void, and being *ultrà vires*, and not merely irregular, it is not protected by the registration under the 127th section.

We also contend that the arrangement proposed was fraudulent, as being for the benefit of the debtor and not of the general body of the creditors: *Ex parte Cobb* (2).

Mr. *Winslow*, Q.C., and Mr. *Bagley*, for the debtor:—

If there was any irregularity in the resolution it is cured by registration under the 127th section: *Ex parte Pooley* (3), in which case the effect of the resolution was to accept a composition, which is one of the charges against the resolution in the present case. But, in fact, the clause complained of was nothing more than an instruction to the trustee under the 20th section, and if it was irregular he may disregard it; but it does not make the whole resolution void. There is no proof of fraud. We have evidence to prove that the sum proposed was a fair one, and that the payment was a good one for all parties.

Mr. *Finlay Knight*, for the debtor's mother.

Mr. *Romer*, for the trustee.

Mr. *De Gex*, in reply as to costs.

(1) Cited Roche & Hazlitt's Law and Practice in Bankruptcy, 2nd Ed. p. 433.

(2) Law Rep. 8 Ch. 727.

(3) Ibid. 5 Ch. 722.

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SIR W. M. JAMES, L.J.:—

I am of opinion that the present application must be granted, so far as it asks for a declaration that the 4th clause in the resolution is void. The trustee will then be left to deal with the debtor's separate property at his own discretion, and to call a meeting of the creditors, if he thinks right, for the purpose of asking their advice, just as if no such clause had been passed. In my opinion, that clause was *ultrà vires*. It would be a most dangerous thing if the creditors had the power, without giving any notice, to pass a resolution at the first meeting directing the property to be sold. It is also clear that the clause was in effect a resolution for a composition, as in *Ex parte Lovering* (1), and was void for that reason. But as to the other clauses in the resolution, which were not *ultrà vires*, they have been registered, and cannot now be objected to. The liquidation by arrangement will, therefore, proceed in the ordinary way.

Each party must pay his own costs of this appeal, and in the Court below. The trustee will take his costs out of the estate.

SIR G. MELLISH, L.J., concurred.

Solicitors: Mr. *R. S. Mason;* Messrs. *Spyer & Son.*

L. JJ. 1874 *May* 29.

Ex parte LOVERING. *In re* JONES.

Bankruptcy—Disclaimer of Lease by Trustee—Notice by Landlord—Bankruptcy Act, 1869, *ss.* 23, 24—*Bankruptcy Rules*, 1871, *r.* 28.

Where the trustee of a bankrupt's estate has received a notice calling upon him to disclaim a lease within twenty-eight days, under the 24th section of the *Bankruptcy Act*, 1869, and requires an extension of time beyond the twenty-eight days in order to obtain the consent of the Court under Rule 28 of the *Bankruptcy Rules*, 1871, he must apply for such extension before the twenty-eight days have elapsed, unless he can shew some special circumstances to excuse the delay.

Whether, if the trustee executes a disclaimer without the consent of the Court, it would be nevertheless binding on the landlord, *quære.*

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, sitting as Chief Judge in Bankruptcy.

(1) Cited Roche & Hazlitt's Law and Practice in Bankruptcy, 2nd Ed. p. 433.

L. JJ. 1874 *Ex parte* LOVERING. *In re* JONES.

On the 27th of November, 1873, *Edward Jones*, a draper in *Fulham Road, Brompton*, filed a petition for liquidation by arrangement, which was agreed to by the requisite majority of his creditors, and Mr. *J. H. Lovering* was appointed trustee of his estate.

At the time of presenting the petition *Jones* was the lessee of two houses in *Fulham Road*, under two leases for twenty-one years, granted respectively on the 20th of April, 1859, and the 23rd of September, 1861.

On the 19th of March, 1874, Messrs. *Piesse & Son*, the solicitors for the trustee, wrote to Mr. *Heigham*, the landlord, informing him that the two leases had been deposited by the debtor, before presenting his petition, as security for a loan, and asking what sum the landlord would be disposed to give the trustee for his interest in the leases.

In reply to this letter, Mr. *J. D. Thomson*, the solicitor for the landlord, wrote a letter to the trustee, informing him that his client was not disposed to give the trustee any sum for his interest in the premises, and inclosing the following formal notice, signed by the landlord:—

"23rd March, 1874.

"*Re Edward Jones.*

"Sir,—As landlord of the premises Nos. 36 and 38, *Fulham Road*, I hereby require of you to declare to me forthwith whether you intend to disclaim all interest you, as the trustee of the estate of the above-named *Edward Jones*, may have in such premises and in the leases granted to the said *E. Jones* in respect thereof.

"I am, &c.,

"*G. H. Heigham.*"

This letter was received on the 24th of March, and on the 26th Messrs. *Piesse & Son* returned the following reply:—

"26th March, 1874.

"*Re Edward Jones.*

"Dear Sir,—In reply to your letter, we beg to acknowledge receipt of notice calling upon the trustee to elect whether he will disclaim or not. He intends to disclaim his interest in the leases 36 and 38, *Fulham Road*, and we will send you notice of motion, which we

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presume you will accept on behalf of your client, but we shall not be able to get a day for hearing the motion until after the Easter Vacation.

"Yours faithfully,

"*Piesse & Son.*"

On the 24th of April, 1874, about a fortnight after the Easter Vacation, notice was served upon Mr. *Thomson* of the intention of the trustee to apply to the Court for liberty to disclaim the leases of the premises.

The motion was heard by Mr. Registrar *Spring Rice* on the 2nd of May, when the Registrar refused the application, considering that as the time allowed by the 24th section of the *Bankruptcy Act*, 1869, for a trustee to disclaim had expired before the application was made, and no extension of time had been previously obtained, the Court had no power to grant the application. From this decision the trustee appealed.

Mr. *De Gex*, Q.C., and Mr. *Robertson Griffiths*, for the Appellant:—

Rule 28 of the *Bankruptcy Rules*, 1871, which renders it necessary for the trustee to apply for the consent of the Court to his disclaimer, has introduced a difficulty into the practice, because it is generally impossible for the trustee to get the consent of the Court within the twenty-eight days prescribed by the 24th section of the Act of 1869 (1).

Under that section the trustee is entitled to the full twenty-

(1) 32 & 33 Vict. c. 71, s. 24: "The trustee shall not be entitled to disclaim any property in pursuance of this Act in cases where an application in writing has been made to him by any person interested in such property requiring such trustee to decide whether he will disclaim or not, and the trustee has for a period of not less than twenty-eight days after the receipt of such application, or such further time as may be allowed by the Court, declined or neglected to give notice whether he disclaims the same or not."

Rule 28 of the *Bankruptcy Rules*, 1871, is as follows:—"Where any property of a bankrupt acquired by a trustee under the *Bankruptcy Act*, 1869, shall consist of a leasehold interest, the trustee shall not execute a disclaimer of the same without the leave of the Court being first obtained for that purpose, and upon any application to the Court for such leave notice of the desire of the trustee to disclaim such interest shall be given to such person or persons as the Court shall direct, and such order shall be made thereon as the Court shall think fit.

eight days before he exercises his discretion, and if the Court has not then given its consent, he may get the time enlarged for that purpose, even though the time has expired before he makes the application: *Banner* v. *Johnston* (1). In the present case, the trustee gave a good reason for the delay, namely, the intervention of the Easter Vacation. But we also contend that the letter of the 26th of March was, in fact, a disclaimer by the trustee in compliance with the 24th section, and although he may have broken the 28th rule in giving it without the consent of the Court, yet it is nevertheless binding as against the landlord.

Mr. *Finlay Knight*, for the landlord:—

Neither party was bound by the letter of the 26th of March. It was merely a notice of the trustee's intention to apply for the Court's permission to disclaim. He ought to have made the application before the twenty-eight days had expired, and then the Court would have delayed the time until the matter could be heard. This is the usual practice in such cases; but in this case the trustee let the twenty-eight days elapse without taking any steps, and it is now too late to make the objection, and the landlord is entitled to the benefit of the 24th section.

Mr. *De Gex*, in reply.

SIR G. MELLISH, L.J.:—

I am of opinion that the order of the Registrar was right. The first question is, whether the trustee did actually disclaim the lease within twenty-eight days. Although there is some little difference in the wording of the 23rd and 24th sections of the *Bankruptcy Act*, 1869, I think that the meaning of them is clear. The 23rd section says that the trustee must make the disclaimer by writing under his hand; and I think that the trustee cannot give notice of the disclaimer to the lessor, under the 24th section, until he has executed such a disclaimer, as required by the 23rd section. Then, Rule 28 of the *Bankruptcy Rules*, 1871, says that the trustee is not to make the disclaimer without the leave of the Court, and the persons interested are entitled to be served. In

(1) Law Rep. 5 H. L. 157.

L. JJ. 1874

Ex parte LOVERING. *In re* JONES.

the present case the landlord's solicitor wrote on the 23rd of March as follows:—[His Lordship read the letter.] On the 26th of March the trustee's solicitors wrote a letter in reply, in which they say that the trustee "intends to disclaim," but that they will send a notice of motion, and that they do not expect to get a day for hearing the motion till after the Easter Vacation. Did this amount to an actual disclaimer? Whether, if a trustee chose to execute an actual disclaimer without obtaining the consent of the Court, it might not amount to a valid disclaimer as against the landlord, within the 23rd section, although by so doing he might be violating the law, it is not necessary to decide; but in the present case, looking to the fact that the solicitors of the trustee asked the solicitor of the landlord "to accept service of the notice of motion," I feel no doubt that the writers of the letter thought that the person to whom they wrote was well acquainted with the law, and that they did not intend by that letter to disclaim on the part of the trustee, but only to express his intention of disclaiming, and to ask the solicitor of the landlord to accept service of the necessary application to the Court. I am therefore of opinion that the letter was not an actual disclaimer by the trustee.

Then the trustee took no further step till three days after the twenty-eight days had elapsed, and the Registrar held that he was then too late to execute a disclaimer. Having regard to the case of *Banner* v. *Johnston* (1), I do not wish to lay down that the Court has in no case jurisdiction, after the twenty-eight days have elapsed, to enlarge the time. But we are informed by the Registrar that it is the practice of the Bankruptcy Court for the trustee, if he wishes to disclaim, and finds that he cannot obtain the consent of the Court within the twenty-eight days required by the 24th section, to apply to the Court before the twenty-eight days have elapsed for an enlargement of the time. That appears to me to be a very wholesome practice. If we were to depart from it in this case, and if trustees were allowed to come a week or a month after the time had elapsed, and ask to have the time enlarged, the greatest inconvenience would result. The landlord and other persons interested would never know when the matter was finally settled. Therefore, unless something extraordinary

(1) Law Rep. 5 H. L. 157.

happens, from such a cause as illness, or unless the landlord has done something to put the trustee off his guard, I think that the time ought not to be enlarged unless the trustee applies before the expiration of the twenty-eight days. In the present case the reason alleged, namely, the Easter Vacation, was no sufficient cause for the delay.

I do not agree with the argument that the trustee was bound by the expression of intention contained in the letter; he was entitled to change his mind, and if he afterwards found, before the consent of the Court had been obtained, that it was for the benefit of the bankrupt's estate that he should not disclaim, it would have been his duty to withdraw his application for the consent of the Court. In the present case, however, the trustee did nothing within the twenty-eight days, and the landlord was entitled to stand upon his strict rights. I am, therefore, of opinion that the Registrar was right, and the appeal must be dismissed with costs.

SIR W. M. JAMES, L.J., concurred.

Solicitors: Messrs. *Piesse & Son;* Mr. *J. D. Thomson.*

Ex parte LOWENTHAL. *In re* LOWENTHAL (No. 2).

Bankruptcy—Adjudication—Evidence—Appeal—Foreign Bill of Exchange—Protest by Notary—Form of Notice of Dishonour.

Where it is intended to rely on the insufficiency of the evidence of trading or other facts to impeach the validity of an adjudication of bankruptcy, the objection ought to be taken in the first instance, when the insufficiency may be cured by additional evidence.

The holder of a foreign bill of exchange which was dishonoured by the acceptor, had it duly presented and protested by a notary public. In the notice of dishonour which he sent to the drawer he informed him that the bill had been "duly presented for payment and returned dishonoured," but made no mention of the protest by the notary:—

Held, that the notice of dishonour was sufficient.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy made in the bankruptcy of *Emil Lowenthal*, a merchant of *Sierra Leone.*

L. JJ.
1874
Ex parte LOWENTHAL.
In re LOWENTHAL. (No. 2.)

The proceedings in bankruptcy were founded on a bill of exchange dated at *Sierra Leone* the 23rd of September, 1872, and drawn by the bankrupt upon Messrs. *Southam, Wike, & Co.* for £1497 13*s.* at ninety days' sight, and indorsed by the bankrupt. After passing through the hands of two other indorsees it came into the hands of the *Sheffield Banking Company* for value. On the 22nd of January they presented it to the acceptors for payment, but it was dishonoured, and the bill was accordingly placed in the hands of a notary public, who formally presented it to the acceptors, and, when it was dishonoured, duly protested it.

On the 24th of June, 1874, the manager of the banking company wrote the following letter to the bankrupt, informing him of the dishonour of the bill. The words in italics were written with a pen; the rest of the document was a printed form:—

"Sheffield Banking Company.

"Sheffield, 24 *Jany.*, 1873.

"*Sir*,—I have to inform you that *your draft on Southam, Wyke, & Co., of Manchester, dated the 28th Sept.*, 1872, *at ninety days' sight, accepted 21st Oct.*, 1872, *due 22nd January*, 1873, for £1497 13*s.*, has been duly presented for payment, returned dishonoured, and now lies at this bank; amount, with charges, £1502 7*s.* 8*d.*, to which I request your immediate attention.

"I am, &c."

On the 27th of October, 1873, the banking company served the bankrupt, who was then in *Liverpool*, with a debtor's summons, as a trader, calling upon him to pay the amount due to the bank on the above-mentioned bill, and another bill for £900, within seven days (1); and the debt not being paid, a petition for adjudication was presented, and the debtor was adjudicated bankrupt by the County Court of *Liverpool* on the 28th of March, 1874. The proof of trading rested on the evidence of *George Miles*, general manager of Messrs. *Child & Co.*, merchants at *Manchester*, who swore that the debtor was an African merchant, and that Messrs. *Child & Co.* had shipped goods for him to *Sierra Leone*.

Evidence was given as to the practice of the banking company

(1) See *Ex parte Lowenthal*, *ante*, p. 324.

in posting their letters, but proof was not strictly given of the posting of the particular letter containing the notice of dishonour. It appeared, however, that *Lowenthal* had afterwards, in conversation, admitted his liability on the bill.

The Judge of the County Court made the order of adjudication, and the bankrupt appealed from the order. The Chief Judge affirmed the order, and the bankrupt now appealed from the decision of the Chief Judge.

Mr. *Little*, Q.C., and Mr. *Yate Lee*, for the Appellant:—

On the sufficiency of the evidence as to the posting of the letter they referred to *Hetherington* v. *Kemp* (1); *Hawkes* v. *Salter* (2); *Byles* on Bills (3). With respect to the form of the notice they contended that, being a foreign bill, strict notice that it had been presented and protested by a notary public was necessary in order to charge the drawer: *Gale* v. *Walsh* (4); *Robins* v. *Gibson* (5); *Brough* v. *Parkings* (6); *Goodman* v. *Harvey* (7).

Mr. *De Gex*, Q.C., and Mr. *G. W. Lawrance*, for the trustee, were not called on.

SIR W. M. JAMES, L.J.:—

With respect to the proof of the posting of the letter containing the notice of dishonour, I am of opinion that the evidence is sufficient: at any rate, if there has been any deficiency in the evidence on this point, the specific objection ought to have been taken in the County Court, where it could have been at once cured.

Then it is said that the notice of dishonour did not say in terms that the bill had been presented by a notary and protested. No doubt, being a foreign bill, it must, in order to charge the drawer, have been presented and protested by a notary public; and, according to some of the old authorities, it seems to have been

(1) 4 Camp. 193.
(2) 4 Bing. 715.
(3) 11th Ed. p. 278.
(4) 5 T. R. 239.
(5) 1 M. & S. 288.
(6) 2 Ld. Raym. 992.
(7) 4 A. & E. 870.

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supposed that the notice of dishonour ought to have been accompanied by a copy or memorial of the protest. But in the first case in which the question was formally considered, namely, in *Goodman* v. *Harvey* (1), it was decided that this was not necessary, and that it was sufficient if notice of the protest was sent. In the present case the notice merely stated, as in the case of an English bill, that the bill "had been duly presented and returned dishonoured." I think that was sufficient notice to any one who knew the law (which every one must be taken to know), that everything had been done in due form to enable the holder of the bill to proceed against the drawer. If it stood there, therefore, I should think the objection untenable. But the evidence also shews that *Lowenthal* had, in conversation, afterwards admitted his liability on the bill, and so had waived that proof of the notice of dishonour and protest.

With regard to the trading, I think it is proved beyond reasonable doubt. The bill speaks for itself in this respect, for it was dated at *Sierra Leone*, and was drawn upon a firm in *Liverpool*, and *primâ facie* must be taken to have been drawn in the way of business. But the same observation applies to this as to the first objection, that if there had been any doubt it might easily have been set at rest by a few additional questions to the witnesses in the County Court. I think the objections are all frivolous, and the appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Mr. *H. G. Field*, agent for Mr. *Etty, Liverpool;* Messrs. *Phelps & Sidgwick.*

(1) 4 A. & E. 870.

Ex parte BUTCHER. *In re* MELDRUM.

L. JJ.
1874
May 22;
June 5.

Bankruptcy—Fraudulent Preference—"Payee in Good Faith and for Valuable Consideration"—Bankruptcy Act, 1869, *s.* 92.

The protection given by the 92nd section of the *Bankruptcy Act*, 1869, in cases of fraudulent preference to a purchaser, payee, or incumbrancer in good faith and for valuable consideration, extends to the creditor who is so preferred as well as to those claiming under him. If, therefore, a creditor for valuable consideration has no notice or suspicion that his debtor is in insolvent circumstances when the payment or transfer by way of fraudulent preference is made to him, he is protected.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy, made in the liquidation of the estate of Messrs. *J. S. Meldrum & A. Wylder,* calico printers at *Manchester.*

For some years past the liquidating debtors had been in the habit of buying goods from Messrs. *L. & H. Stead* on what are known as *Manchester* terms, namely, that goods bought before the 25th day of any month were to be paid for in cash on the first Tuesday after the end of the following month; although they had sometimes purchased goods from the same firm on shorter terms.

In October, 1873, the liquidating debtors purchased goods from Messrs. *Stead* to the amount of £190, which, according to the *Manchester* terms, would have been payable on the 2nd of December.

In the month of November the liquidating debtors became aware that they were insolvent, and could no longer carry on their business, and they gave directions to the clerks to sell their stock-in-trade and other property, and to pay their ordinary trade creditors, but not to pay certain creditors who had made advances to them. In pursuance of these instructions one of their clerks, on the 22nd of November, paid the sum of £186 13*s.* 9*d.* to Messrs. *Stead,* which was the amount of their debt less discount.

Messrs. *Stead* asserted, and the Chief Judge and also the Court of Appeal considered, that it was satisfactorily established, that they had no knowledge at the time of the payment of this sum that the debtors were insolvent, or that their affairs were likely to be wound up in bankruptcy. The debtors presented their petition for liquidation by arrangement on the 3rd of December, 1873, which was agreed to by the requisite majority of creditors,

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and a trustee was appointed. The trustee claimed to have the sum of £186 13*s.* 9*d.* repaid by Messrs. *Stead*, as having been paid by way of fraudulent preference; but the Chief Judge refused to make the order, considering that the payment was protected by the concluding clause of the 92nd section of the *Bankruptcy Act*, 1869 (1). The trustee appealed from this decision.

Mr. *Herschell*, Q.C., and Mr. *S. Taylor*, for the Appellant:—

The question turns entirely upon the interpretation of the last clause of the 92nd section of the *Bankruptcy Act*, 1869. We contend that it was not intended to protect the creditors or transferees who receive payment or take transfers from the debtor, but those who were purchasers or mortgagees from such creditors. Under the law as it stood before the Act of 1869, payments or transfers by way of fraudulent preference were not void, but only voidable, and all persons taking *bonâ fide* under the creditor so preferred were safe. But the present law has made such payments and transfers absolutely void if made within three months of bankruptcy; and it was therefore necessary to insert a clause protecting *bonâ fide* purchasers under these circumstances: *Stevenson* v. *Newnham* (2). This interpretation is confirmed by the use of the word "payee," which, according to its ordinary meaning, does not refer to the creditor to whom payment has been made, but a person in whose favour the creditor makes an order for payment.

If the clause refers to the creditor, it can only apply to a creditor who gives some fresh consideration; it cannot refer to the original debt, for every creditor is a creditor for valuable consideration in that sense: *Ex parte Tempest* (3). If the decision of the Chief Judge is right, the object of the provisions respecting fraudu-

(1) 32 & 33 Vict. c. 71, s. 92:— "Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own moneys in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same become bankrupt within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee of the bankrupt appointed under this Act; but this section shall not affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration."

(2) 13 C. B. 285.

(3) Law Rep. 6 Ch. 70.

lent preference will be quite defeated; for a debtor can make what payments he likes even on the brink of bankruptcy, provided he says nothing about his insolvency to the creditor.

Mr. *Benjamin*, Q.C., and Mr. *Marten*, Q.C., for the creditors:—

There was no intention on the part of the debtors in this case to prefer the creditors. The payment was made in the ordinary course of business. The goods were bought by the debtors after they knew that they were insolvent, and would not be able to carry on the business; but they continued to buy goods that the business might be sold as a going concern. They were all bought on what are considered in *Manchester* ready money terms, and the debtors were in the habit of paying for them, when it suited their convenience, before the money was actually due, in order that they might get a discount. But supposing there was an intention on the part of the debtors to prefer the creditors, the creditors are protected by the last clause in the 92nd section; for they had no knowledge or suspicion of the debtors' insolvent circumstances. There has been a change in the law with respect to cases of fraudulent preference. Formerly the question depended on the intention of the debtor, and it made no difference what was in the creditor's mind, but under the present Act it is necessary to shew *mala fides* both on the part of the creditor and the debtor; and if the creditor had no knowledge of the impending bankruptcy, he is protected: *Ex parte Blackburn* (1); *Ex parte Norton* (2); *Ex parte Topham* (3).

There is no reference to a third person in the last clause of the 92nd section. The words "purchaser, payee, or incumbrancer" refer to the words in the beginning of the section: "transfer," "charge," and "payment." The transaction is also protected by the 94th section of the Act. The distinction between the 94th and 95th sections is this, that the 94th protects dealings in good faith on the part of the creditor; the 95th protects (with certain exceptions) dealings in good faith on the part of the debtor.

Mr. *Herschell*, in reply:—

The 94th section does not relate to payments to a creditor but to payments by the debtor. Payments to creditors come within

(1) Law Rep. 12 Eq. 358. (2) Law Rep. 16 Eq. 397.
(3) Law Rep. 8 Ch. 614.

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the 95th section, and that section is made expressly subject to the provisions respecting fraudulent preference.

June 5. The judgment of the Court was delivered by SIR G. MELLISH, L.J., as follows:—

The question to be determined in this appeal is whether the trustee of Messrs. *Meldrum & Wylder*, liquidating debtors, is entitled to recover the sum of £186 13*s.* 9*d.* from Messrs. *Lawrence Stead* and *Henry Stead*, upon the ground that it had been paid to them by the debtors by way of fraudulent preference within three months of the liquidation. The County Court Judge of *Manchester* held that the trustee was entitled to recover the money, but his judgment was reversed by the Chief Judge. Messrs. *Stead* have been for several years in the habit of supplying the debtors with goods, and sold them the goods, the price of which is now in question, in October, 1873. In November, 1873, the debtors, having become aware that they were hopelessly insolvent, gave orders to their clerks to sell their stock-in-trade and other property, and with the proceeds to pay their ordinary trade creditors, but not to pay certain particular creditors to whom they were largely indebted for advances. On the 22nd of November, 1873, the sum of £186 13*s.* 9*d.* was paid by one of the clerks in pursuance of these instructions to Messrs. *Stead*. It is unnecessary to describe the facts in greater detail, because we are clearly of opinion on the evidence that the payment was a payment made by persons unable to pay their debts as they became due from their own moneys in favour of Messrs. *Stead*, with a view of giving Messrs. *Stead* a preference over their other creditors, within the 92nd section of the *Bankruptcy Act*, 1869; but we are at the same time of opinion that Messrs. *Stead* received the money in the ordinary course of business, and without any notice that Messrs. *Meldrum & Wylder* were insolvent, or that they, Messrs. *Stead*, were being preferred to the other creditors.

The question to be decided is whether, under these circumstances, Messrs. *Stead* are protected by the proviso at the end of the 92nd section, by which it is enacted, "But this section shall not affect the rights of a purchaser, payee, or incumbrancer

in good faith and for valuable consideration." On the part of the Appellant it was argued that the object of this proviso was simply to protect purchasers and mortgagees to whom property was transferred by creditors who had received the same from their debtors by way of fraudulent preference, and that the creditors themselves were not included in the proviso at all. It was said that the conveyance and transfer of property being made absolutely void and not merely voidable, it was necessary to protect such purchasers and mortgagees, and *Stevenson* v. *Newnham* (1) was referred to. On the part of the Respondents it was contended that, although the proviso might have the effect of protecting purchasers and mortgagees claiming under the creditors preferred, yet the main object of the proviso was to protect the creditors preferred themselves if they were no party to any fraud upon the general body of the creditors; that the Legislature thought it unjust that a creditor who has done nothing except receive payment of his debt, apparently made to him in the ordinary course of business, should be obliged to return the money. The Chief Judge has always been strongly of this opinion. In *Ex parte Blackburn* (2), he says: "It is provided that the enactment making void the payment 'shall not affect the rights of a payee in good faith and for valuable consideration,' a provision which was obviously just, and not more just than necessary, in order to avoid the inconveniences which would arise in the commercial world, and even beyond its pale, if persons receiving payment of their just demands received such payment at the risk of having to refund it in consequence of the improper motive actuating their debtor, but of which motive they had no cognizance, and in which they had in no degree participated." In the still earlier case of *Ex parte Tempest* (3) we both expressed an opinion that a creditor, who had received a conveyance of property in consideration of a sum of money which was to be set off against a debt, would, even if the transfer had on the part of the debtor been a fraudulent preference, have been protected by the proviso as a purchaser in good faith and for valuable consideration. It is true that the opinion we so expressed was not necessary for the decision of the case then before us, and

(1) 13 C. B. 285. (2) Law Rep. 12 Eq. 365.
(3) Law Rep. 6 Ch. 70.

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that neither in this case nor in *Ex parte Blackburn* (1) was the construction now contended for—namely, that the words "purchaser, payee, or incumbrancer" do not apply to the creditor preferred at all, but only to third persons claiming under him—suggested either by counsel or by the Court, and we think, therefore, that we are not absolutely precluded by authority from adopting the construction contended for by the Appellant, if we come to the conclusion that it was the correct one. At the same time we must give considerable weight to the fact that the construction of the section by which the creditor preferred is entitled to the benefit of the proviso has been acted upon for several years.

It was argued that, if the creditor preferred was entitled to the benefit of the proviso the law respecting fraudulent preference would be practically repealed. We think this statement is an exaggeration. In a large number, probably the majority, of cases in which a creditor, or a class of creditors, is preferred by a debtor on the eve of bankruptcy, the creditor preferred is perfectly well aware that the debtor is insolvent, and that he is being preferred over the other creditors. We think, indeed, that both the constructions contended for are in themselves perfectly rational, and that there is no reason for rejecting either of them on account of any consequences which would follow from adopting it.

The real question to be determined is, what is the natural construction of the words used by the Legislature? Now, it was argued for the Respondents that the creditor preferred is not in terms excluded, and that, if he is to be excluded, words must be inserted in the proviso which are not there. On the other hand, it was said that the words "purchaser, payee, or incumbrancer" are themselves words which naturally apply rather to a transferee from the creditor than to the creditor himself. The words "purchaser" and "incumbrancer" seem certainly apt words to describe a person who has purchased the property transferred from the creditor, and a person with whom the property transferred has been pledged. They are not, however, necessarily confined to such a person. A debtor wishing to prefer a particular creditor might offer to sell part of his stock to him in the ordinary way of business, and the creditor might agree to purchase it, and so obtain a set-off, without the least know-

(1) Law Rep. 12 Eq. 365.

ledge on his part that the debtor was insolvent, or that he was being preferred over the other creditors. The Legislature may well have thought that such a purchaser ought to be protected. There was a good deal of argument on the meaning of the word "payee." We think it is clearly opposed to the word "payer," as "vendee" is to "vendor," "mortgagee" to "mortgagor," "indorsee" to "indorsor;" and that, as "payer" means a person who makes a payment, so "payee" means a person to whom payment is made. Now, this being the meaning of the word, it is very difficult to exclude the creditor preferred who receives payment of his debt. It was said that it was intended to protect a person to whom the creditor preferred might transfer a bill or cheque given in payment of his debt. This is not a very natural meaning of the word. Possibly if the creditor preferred used a cheque given to him by the debtor in payment of a debt of his own the person receiving the cheque might be described as a payee; but we can hardly think that the word "payee" was inserted in the proviso for the sole purpose of describing such a person. It was also argued that the words "for valuable consideration" were perfectly useless if the object was to protect creditors, as every creditor must necessarily be a creditor for valuable consideration. There may, however, be creditors by bond or covenant who have given no consideration, and these words may also have been inserted to prevent persons to whom the creditor preferred may have made an assignment without consideration obtaining the benefit of the proviso; for we think it by no means follows that if the proviso extends to the creditors preferred that it may not also extend to protect purchasers from such creditors in cases where the creditors themselves are not protected by reason of their having had notice of the fraudulent nature of the transaction as respects the general body of the creditors. On the whole, we are of opinion that the decision of the Chief Judge ought to be affirmed, and that the appeal must be dismissed with costs.

Solicitors for the Appellant: Messrs. *Grundy & Kershaw, Manchester.*

Solicitors for the Respondents: Messrs. *Pritchard, Englefield, & Co.*, agents for *Mr. J. Leigh, Manchester.*

L. JJ.
1874
July 3.

Ex parte VAUX. *In re* COUSTON.

Bankruptcy—Order and Disposition—Reputed Ownership—Purchaser's Goods in the Bonded Warehouse of a third Party in the name of the Vendor—Custom of Trade—Delivery Order—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 15, *sub-s.* 5.

At the time of the presentation of a petition for liquidation by arrangement certain butts of whisky which had been sold by the debtors to the Appellants were lying in the bonded warehouse of a third person at *Leith*, in the name of the debtors. No delivery order had been given to the purchasers before the filing of the petition, and they were ignorant in what warehouse the whisky was lying:—

Held (reversing the decision of the Chief Judge in Bankruptcy), that the principle of *Ex parte Watkins* (1) applied, and that the custom of the spirit trade excluded the reputation of ownership, although the whisky was in the warehouse of a third party and not in that of the vendors:

Held, also, that the fact of the delivery order not having been given to the purchasers before the commencement of the liquidation did not raise a reputation of ownership in the vendors.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

On the 9th of January, 1872, Messrs. *Vaux & Sons*, of *Sunderland*, purchased of Messrs. *Couston, Thomson, & Co.*, in bond, 5 butts, 2 hogsheads, and 1 quarter cask of whisky for £89 3*s.* 7*d.*, and the invoice was duly sent to them. They accepted a bill of exchange at four months in payment for the whisky.

The whisky was at that time in the bonded warehouse of Messrs. *Muir & Co.*, warehousemen at *Leith*, in the name of the vendors; but the purchasers did not know in what warehouse it was. The whisky was transferred into the names of the purchasers in the stock books of the vendors, but remained in the names of the vendors in the warehouse.

On the 26th of February, 1872, Messrs. *Couston* filed a petition for liquidation, which was agreed to by the requisite majority of creditors, and a trustee appointed.

On the 28th of February, Messrs. *Couston* sent the delivery order to the purchasers, who received it in due course and applied

(1) Law Rep. 8 Ch. 520.

to Messrs. *Muir* to deliver the goods, which they refused to do without the consent of the trustee. Messrs. *Vaux* accordingly applied to the County Court Judge at *Liverpool* for an order for the delivery of the goods, which he refused. They then applied to the Chief Judge in Bankruptcy, who affirmed the decision, and they then appealed from his order (1).

(1) 1874. June 1.

SIR JAMES BACON, C.J.:—

If this case were the same as *Ex parte Watkins* (Law Rep. 8 Ch. 520), of course I should be bound by that decision. It appears to me to be materially different. In *Ex parte Watkins* the purchaser had got the delivery order, an acknowledgment that the goods were his, before the petition for liquidation was presented. Just the contrary is the fact here. Here the purchase took place on the 9th of January, the invoice was transmitted by the vendors to the purchasers on the 16th, and an acceptance was given by the purchasers for the goods. On the 26th of February there was a petition for liquidation, and it was not until the 28th of February that the delivery warrant was sent to the purchasers. Now, between the 26th and the 28th there is an interval of the utmost importance as respects the law in bankruptcy. The clause in the statute which relates to this subject states, that if a trader has at the time of his bankruptcy in his possession goods with the consent of the true owner, they become divisible among his creditors. That is the common familiar practice. That question and every other relating to that particular branch of the bankruptcy law is a question of fact to be decided by a jury if necessary—before the Act of Parliament it would have been necessary to be decided by a jury. What is the question here to be submitted to a jury? On the 26th, which is the time at which the liquidation commenced, there were in the warehouse goods belonging to whom? To no other person in the world but the liquidating debtors. There had been a contract to sell them as between them and the vendees, but as between the warehouseman and all the rest of the world, if on the 27th instead of on the 28th, the debtors had come to the warehouse and said "give us our goods," could there be any doubt that, notwithstanding the contract which had passed the legal right to the goods to the purchasers under the contract, the actual visible possession, the plain ownership, was in the vendors? Is there any other question for me to decide? I do not decide or insinuate anything against what I find decided in *Ex parte Watkins*. I need not trouble myself in this case to consider anything about custom or otherwise, which seems to have been the very ground of the decision in *Ex parte Watkins*. I confine myself to the facts in the case before me. I find as a fact that on the 26th and on the 27th, beyond all doubt, the goods were in the possession of the *Leith* warehouseman, with not only the consent of the true owners, but in the plain apparent possession of the vendors, and that if they had gone down to *Leith* on the morning of the 27th they might have obtained possession of the goods, or they might have transferred any interest they had in them to any person who lent them money upon them. For all practical purposes there was only one visible owner of that property, and the

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Messrs. *Vaux* filed an affidavit, in which they said, "It is the usual custom in the wine and spirit trade for goods to remain in the bonded warehouse of the vendor, or in bonded warehouses of other persons, subject to the order of the vendor, in the vendor's name, after they have been paid for by the purchaser, until required by such purchaser for use, and then for the purchaser to remit to the vendor the amount required by the Government to be paid for duty upon the goods and the warehouse rent payable thereon." Mr. *Harbord*, a bonded warehouse-keeper, also made an affidavit in similar terms to the affidavit of Mr. *Thomson*, stated in the report of *Ex parte Watkins* (1), which is quoted by the Lord Justice *James* in his judgment, respecting the custom of the spirit trade as to goods in bonded warehouses.

Mr. *Herschell*, Q.C. (Mr. *Wheeler* with him), for the Appellants:—

The case is entirely governed by *Ex parte Watkins*. There is no real distinction between that case and the present. In that case the goods remained in the bonded warehouse of the vendors; in the present case they remained in the bonded warehouse of a third person in the name of the vendors. But the purchasers had no knowledge where the goods were, and if they had, it would have made no difference, because the custom of the trade is for the goods to remain in bond for an indefinite time in the vendor's name, until it suits the purchaser's convenience to take them out. There is nothing in the principle upon which *Ex parte Watkins* was decided which does not apply equally to goods in the warehouse of third persons as to goods in the warehouse of the vendors: *Ex parte Ward* (2). The fact that the delivery order had not been sent to the purchaser makes no difference. The evidence shews that it is not the custom for the vendors to send the delivery order until it is applied for, which the purchaser does not do until he wishes to take the goods out of the warehouse.

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right to the property at that time had actually become vested in the trustee of the debtors' estate in the liquidation, and was liable to be applied for the benefit of their creditors. It is a matter which is clear as a matter of fact, and I wish to be understood that I so decide it.

(1) Law Rep. 8 Ch. 520.
(2) Ibid. 144.

Mr. *Milward*, Q.C., and Mr. *W. Potter*, for the trustee :—

This case differs materially from *Ex parte Watkins* (1). Messrs. *Couston* were themselves wharfingers, and the custom of the trade applied to goods in their warehouses, but not to goods belonging to them stored elsewhere.

The fact that the delivery order had not been given to the purchasers makes a material difference between this case and *Ex parte Watkins*. It is in the nature of a bill of lading, and is the only proper evidence of ownership, and is transferable by indorsement. It was the duty of the purchasers to obtain the delivery order and to get the goods transferred into their own name in the books of the warehouse keepers: *Jones* v. *Dwyer* (2). As they neglected to do this, they must be held to have consented to their remaining in the reputed ownership of the vendors.

SIR W. M. JAMES, L.J. :—

I am of opinion that this case is entirely governed by the principle of the decision in *Ex parte Watkins*, in which decision, although I was not one of the Judges who pronounced it, I entirely concur. In that case the Lord Chancellor (Lord *Selborne*), in speaking of the question of reputed ownership, made the following observations (3) :—"What, then, are the principles applicable to the determination of that question ? Much of the argument seems to me to have proceeded on a fallacious application of the expressions 'knowledge of the world' and 'known to the public.' The doctrine of reputed ownership does not require any investigation into the actual state of knowledge or belief, either of all creditors, or of particular creditors, and still less of the outside world, who are no creditors at all, as to the position of particular goods. It is enough for the doctrine if those goods are in such a situation as to convey to the minds of those who know their situation the reputation of ownership, that reputation arising by the legitimate exercise of reason and judgment on the knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject. It is not at all necessary to examine into the degree of actual knowledge which is

(1) Law Rep. 8 Ch. 520. (2) 15 East, 21.
(3) Law Rep. 8 Ch. 528.

L. JJ. 1874 *Ex parte* VAUX. *In re* COUSTON.

possessed, but the Court must judge from the situation of the goods what inference as to the ownership might be legitimately drawn by those who knew the facts. I do not mean the facts that are only known to the parties dealing with the goods, but such facts as are capable of being, and naturally would be, the subject of general knowledge to those who take any means to inform themselves on the subject. So, on the other hand, it is not at all necessary, in order to exclude the doctrine of reputed ownership, to shew that every creditor, or any particular creditor, or the outside world who are not creditors, knew anything whatever about particular goods, one way or the other. It is quite enough, in my judgment, if the situation of the goods was such as to exclude all legitimate ground from which those who knew anything about that situation could infer the ownership to be in the person having actual possession."

In that case the custom of the trade with respect to goods in a bonded warehouse was proved by an affidavit in the following terms (1):—"It is the custom and usual practice in the wine and spirit trade, in *Liverpool*, for goods sold in bond (that is, upon which the Government duty has not been paid) to remain in the bonded warehouse in which they are stored at the time of sale, in the possession or under the control of the vendor, after they have been paid for by the purchaser; the vendor giving to the purchaser, when required by him, an authority to receive the goods from him or the warehouse-keeper, called a delivery order or warrant. These delivery orders, if they are not applied for by the purchaser, are rarely, if ever, given to him at all, but the goods sold remain in the possession or under the control of the vendor, who charges warehouse rent for them to the purchaser. When the goods are required by the purchaser for use he generally sends to the vendor the amount of duty payable, and the vendor pays the duty to the Government, and forwards the goods to the purchaser or his order, making a small charge for so doing. In all cases, on the sale of goods, the same are transferred, in what is called the bond book of the vendor, into the name of the purchaser, the same being struck out of the stock book of the firm as assets of the firm."

The Court in that case thought that the facts were such that

(1) Law Rep. 8 Ch. 521.

they excluded the doctrine of reputed ownership. The only difference in the present case is that the whisky was in another warehouse, not the warehouse of the vendors, the purchasers not knowing where it was, and therefore not being assenting parties to its remaining in the names of the vendors in the books of the warehouseman. That distinction appears to me wholly immaterial; no such distinction is alluded to in *Ex parte Watkins* (1). Reliance was also placed in the argument on the part of the trustee on the fact that in *Ex parte Watkins* a delivery order had been given to the purchaser before the petition for liquidation was presented, and that here no such order had been given. I have been utterly unable to follow that argument. It had nothing to do with the question of reputed ownership, it was entirely a matter between the vendor and the purchaser. Indeed, it appears to me that the delivery order being given before the presentation of the petition, as was the case in *Ex parte Watkins,* would be rather adverse to the purchaser; for if he had it in his possession and did not present it, it might be argued that he had through his own negligence permitted the goods to remain in the vendor's possession.

The real question in *Ex parte Watkins* was as to the effect of the custom of the trade, and the evidence is clear that the same custom applies whether the goods are in the vendor's bonded warehouse or in some one else's. I am therefore of opinion that this case is entirely governed by *Ex parte Watkins*, and that the order of the Chief Judge must be discharged, and the whisky must be given up to the purchasers.

SIR G. MELLISH, L.J.:—

I am of the same opinion. The principle laid down in *Ex parte Watkins* was, that in determining whether, when goods sold remain in the possession of the vendor up to the time of his bankruptcy, the vendor is the reputed owner of them, the Court must have regard to the custom of the particular trade, and if there was a well-established custom that goods when sold should remain in the possession of the vendor it prevents the mere fact of their con-

(1) Law Rep. 8 Ch. 520.

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tinuing in his possession from giving the reputation of ownership. The real question in that case was whether it was enough to prove the existence of such a custom in a particular trade; and the Court of Appeal held, on the authority of several recent cases at common law, that it was enough to prove the custom of the particular trade, because the creditors of a trader are mostly persons engaged in the same trade, or bankers or other persons who are acquainted with the custom of that particular trade. That being so, does it make any difference that these goods were in another man's warehouse, and not in the vendor's warehouse, as was the case in *Ex parte Watkins?* (1) As to the purchaser, it could make no difference. The evidence shews that the custom exists for the goods to remain in the name of the vendor at the bonded warehouse, but for them to be transferred in the vendor's own books. The purchaser buys them in bond, and by the custom of the trade they may remain there for years, to avoid the payment of duty on them, in the possession of the vendor or of some person who holds them for him. The reputation of ownership is prevented from arising just as much when the goods are in another person's warehouse as in the vendor's. If the vendor's creditors know nothing about the goods, it can make no difference in what warehouse they are. If they know that the goods are in the vendor's name in the warehouse of a third person, they know that they are not necessarily for that reason the vendor's goods. I think, therefore, that the principle of *Ex parte Watkins* applies to this case.

Mr. *Herschell* asked for the costs of the appeal out of the estate, on the ground that this was a representative case. There were several other purchasers of goods in the same circumstances, and this decision would save expense in other cases.

SIR W. M. JAMES, L.J.:—I am afraid that is not a sufficient reason for departing from the general rule. There will be no costs of the appeal.

Solicitors: Mr. *W. W. Wynne;* Messrs. *Chester, Urquhart, & Co.*

(1) Law Rep. 8 Ch. 520.

Ex parte JAMES. *In re* CONDON.

L. JJ.
1874
July 10.

Bankruptcy—Execution Creditor—Notice to Sheriff of Petition for Liquidation—Neglect of Creditors to pass Resolution—Subsequent Petition and Adjudication of Bankruptcy—Bankruptcy Act, 1869, *ss.* 87, 125, *sub-s.* 12—*Bankruptcy Rules*, 1870, *r.* 267—*Mistake of Law, Relief against.*

A creditor levied execution on his debtor's goods for a debt exceeding £50, and the sheriff seized and sold them. The debtor filed a petition for liquidation, and served notice of it on the sheriff before the sale. Before the expiration of fourteen days after the sale the first meeting of the creditors was held, but no resolution was passed. The sheriff then, after the expiration of the fourteen days, paid the proceeds of the sale to the execution creditor. Afterwards a bankruptcy petition was filed by another creditor, which stated the filing of the petition for liquidation and the failure of the proceedings, and the debtor was adjudicated bankrupt under this petition. The trustee demanded the proceeds of the sale from the execution creditor, who paid them to him, believing that he was legally entitled to them:—

Held, that the liquidation proceedings entirely came to an end on the failure of the meeting to pass a resolution, and that the debtor was not adjudged a bankrupt on the liquidation petition within the meaning of the 87th section of the *Bankruptcy Act*, 1869; and the sheriff was therefore justified in paying the proceeds of the sale to the execution creditor:

Held, also, that the Court had jurisdiction to relieve against the mistake of law, and to order the money to be repaid by the trustee to the execution creditor.

Proceedings under Rule 267 of the *Bankruptcy Rules*, 1870, for adjudication of bankruptcy based upon the neglect of the first meeting of creditors to pass a resolution for liquidation or composition, must be commenced by petition.

THIS was an appeal from a decision of Mr. Registrar *Roche*, sitting as Chief Judge in Bankruptcy.

In the month of October, 1873, *H. Bradshaw* commenced an action in the Court of Queen's Bench against *John Condon*, in which he obtained judgment for his debt and costs, amounting to £274 3*s.* 5*d.*

On the 15th of November, 1873, *Bradshaw* sued out a writ of *fieri facias* against *Condon*, and on the 17th of November the Sheriff of *Middlesex* took possession under it of certain goods of the Defendant's at *Millwall.*

On the 18th of November, *Condon* filed a petition for liquidation by arrangement, notice of which was served on the sheriff on the 22nd of November.

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On the same day the sheriff sold the goods, which produced a net sum of £142 15*s.* 6*d.*

On the 5th of December the first general meeting of creditors was held, but no resolution was passed except that the meeting should be adjourned till the 16th of December.

On the 16th of December neither the debtor nor his solicitor was present at the adjourned meeting, and no resolution was passed by the creditors. No further proceedings were taken in the liquidation.

On the 17th of December the sheriff paid *Bradshaw* the sum of £142 15*s.* 6*d.*, which he had retained to await the result of the petition for liquidation.

On the 19th of December a petition for adjudication in bankruptcy was filed by another of *Condon's* creditors. This petition was filed under Rule 267 of the *Bankruptcy Rules*, 1870, and stated the filing of the petition for liquidation by arrangement, and that no resolution had been passed at the meeting of creditors, and that no other proceedings had taken place under the petition for liquidation.

On the 10th of January, 1874, *Condon* was adjudicated bankrupt, and Mr. *J. E. James* was appointed trustee of his estate.

Soon after the appointment of the said trustee the solicitors for the trustee threatened *Bradshaw* with proceedings if the money received by him from the sheriff was not paid over to the trustee, and on the 23rd of February, 1874, *Bradshaw*, being advised that, according to the law as then laid down, he would have no defence against such proceedings, paid the sum of £142 15*s.* 6*d.* to the trustee.

After the decision of the case of *Ex parte Villars* by the full Court of Appeal (1), *Bradshaw* applied to the trustee to refund the money, and the matter having been brought before the Registrar, on the 26th of June he made an order to that effect. From this decision the trustee appealed.

Mr. *Thesiger*, Q.C., and Mr. *Cooper Willis*, for the Appellant:—

The question in this case really turns upon the construction of

(1) *Ante*, p. 432.

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the clause in the 87th section of the *Bankruptcy Act*, 1869 (1), which provides that in cases where notice of a bankruptcy petition has been served on the sheriff, if "the trader against whom the petition has been presented is not adjudged a bankrupt on such petition, or on any other petition of which the sheriff, high bailiff, or other officer, has notice, he may deal with the proceeds of such sale in the same manner as he would have done had no notice of the presentation of a bankruptcy petition been served on him." Under the 125th section a petition for liquidation is for this purpose equivalent to a bankruptcy petition; and we contend that, according to the true construction of this section, the debtor has in this case been adjudged a bankrupt on the petition which was served on the sheriff, and that the proceeds ought, therefore, not to have been paid over to the execution creditor. The proceedings in the liquidation were still pending: *Ex parte Jeffery* (2); and it was the duty of the sheriff to keep the proceeds beyond the fourteen days until he was able to see, not only that the liquidation would not proceed, but that no bankruptcy would arise out of it. In the present case bankruptcy has resulted from the liquidation, for the Court made the order for adjudication under Rule 267 of the *Bankruptcy Rules*, 1870 (3), based upon the neglect of the creditors to pass any resolution; and

(1) 32 & 33 Vict. c. 71, s. 87: "Where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding fifty pounds, and sold, the sheriff, or in case of a sale under the direction of the County Court, the high bailiff, or other officer of the County Court, shall retain the proceeds of such sale in his hands for a period of fourteen days, and upon notice being served on him within that period of a bankruptcy petition having been presented against such trader, shall hold the proceeds of such sale, after deducting expenses, on trust to pay the same to the trustee; but if no notice of such petition having been presented be served on him within such period of fourteen days, or if such notice having been served the trader against whom the petition has been presented is not adjudged a bankrupt on such petition, or on any other petition of which the sheriff, high bailiff, or other officer has notice, he may deal with the proceeds of such sale in the same manner as he would have done had no notice of the presentation of a bankruptcy petition been served on him."

(2) Law Rep. 17 Eq. 61.

(3) *Bankruptcy Rules*, 1870, r. 267: "In the event of any neglect on the part of the creditors to pass such resolution, the Court may on the application of any of the creditors, and after notice to the debtor, make an order of adjudication against the debtor, or direct the bankruptcy to be proceeded with, as the case may be."

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it had also power to make the order under the *Bankruptcy Act*, 1869, s. 125, sub-s. 12 (1). For this purpose, no petition in bankruptcy was necessary; it would have been sufficient to give the Court notice of the failure of the liquidation proceedings: *Ex parte Page* (2); *Ex parte Mylne* (3).

We also contend, even if the Court should be against us on the construction of the Act, that the money having been paid to the trustee voluntarily, under a mistake of law, cannot now be recovered from him. The trustee is not an officer of the Court, but the representative of the general body of the creditors, and he did not receive the money from the execution creditor *virtute officii*, but simply as such representative: *Brisbane* v. *Dacres* (4); *Steele* v. *Williams* (5).

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the execution creditor:—

The debtor cannot be said, in any sense, to have been adjudged a bankrupt on the liquidation petition. The proceedings in liquidation were entirely at an end. The meeting had come to a conclusion without passing any resolution, and there could be no fresh first meeting, *Ex parte Cobb* (6), and it was impossible that anything further could be done under it. The petition in bankruptcy was a totally new proceeding; it is true that the petition recited the petition for liquidation, but that was because the filing of the petition was the act of bankruptcy on which the bankruptcy petition was founded: *In re Jones* (before C. J. *Bacon*, Feb. 25, 1870); *Ex parte Duignan* (7). It could never have been intended by the Legislature that after the sheriff knew that the liquidation proceedings had failed he should keep the money for six months to see whether a bankruptcy petition would be

(1) 32 & 33 Vict. c. 71, s. 125, sub-s. 12: "If it appear to the Court on satisfactory evidence that the liquidation by arrangement cannot, in consequence of legal difficulties, or of there being no trustee for the time being, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the Court may adjudge the debtor a bankrupt, and proceedings may be had accordingly."

(2) 25 L. T. (N.S.) 716.

(3) Roche and Hazlitt's Law and Practice of Bankruptcy, 2nd Ed. p. 493.

(4) 5 Taunt. 143, 151.

(5) 8 Ex. 625.

(6) Law Rep. 8 Ch. 727.

(7) 40 L. J. (Bkcy.) 68.

founded upon the act of bankruptcy committed by filing the petition for liquidation. The *Bankruptcy Act*, 1869, s. 125, sub-s. 12, has no application to a case where no resolution at all has been come to, and where therefore the liquidation proceedings are at an end. The sheriff was therefore justified in paying the money to the execution creditor: *Ex parte Villars* (1).

Then with respect to the second point, we contend that the trustee is an officer of the Court, and is bound to administer the money in his hands according to the principles of the law of bankruptcy. By the 20th section of the *Bankruptcy Act*, 1869, he is placed in the same position as a receiver of the Court of Chancery. But independently of the nature of the office of the trustee, the rule that relief cannot be given for a mistake of law has never been considered by the Court of Chancery an inflexible rule, and has been departed from in cases where manifest injustice would result from it: *Re Saxon Life Assurance Society* (2); *Stone* v. *Godfrey* (3).

Mr. *Thesiger*, in reply.

SIR W. M. JAMES, L.J.:—

I am of opinion that the order of the Registrar must be affirmed. I adhere to the opinion which I expressed in *Ex parte Villars*, that the rights of an execution creditor ought to be respected except so far as the Act of Parliament has expressly interfered with them. In levying his execution, he has only done what he had a right to do, and he is entitled to enjoy the proceeds of it unless he is restrained from so doing by the Act. The onus of proof is thrown on those who desire to shew that he ought not to reap the fruits of his execution.

In this case it is impossible to say that the adjudication of bankruptcy was made on any petition of which the sheriff had notice before he paid the money to the execution creditor. If before the proceedings in liquidation had failed another petition had been presented before the money had been paid over by the sheriff, it would have been a different case. But the result of what took

(1) *Ante*, p. 432. (2) 2 J. & H. 408.
(3) 5 D. M. & G. 76.

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place at the meeting of the 16th of December was, that the proceedings under the petition for liquidation came hopelessly to an end. There was nothing in the nature of a resolution, nothing that could result in the appointment of a trustee. Any creditor might, if he had chosen to do so, have presented a petition for adjudication within the fourteen days, and thus have intercepted the right of the execution creditor; but this was not done, and I think therefore that the sheriff was justified in paying over the money, and that the execution creditor was entitled to keep the proceeds of the sale.

With regard to the other point, that the money was voluntarily paid to the trustee under a mistake of law, and not of fact, I think that the principle that money paid under a mistake of law cannot be recovered must not be pressed too far, and there are several cases in which the Court of Chancery has held itself not bound strictly by it. I am of opinion that a trustee in bankruptcy is an officer of the Court. He has inquisitorial powers given him by the Court, and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The Court, then, finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people. The appeal must be dismissed, but without costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion. This case cannot, in principle, be distinguished from *Ex parte Villars* (1) as to the construction of the 87th section. Although a petition for adjudication is alone mentioned in it, it must be understood, under sect. 125, to apply equally to a petition for liquidation by arrangement, and therefore it must be read as if a petition for liquidation had been mentioned in it. When, therefore, the sheriff has received notice of a liquidation petition having been filed, he is bound to keep the proceeds of the sale beyond the fourteen days, until he knows

(1) *Ante*, p. 432.

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whether the proceedings under the petition have come to an end or not. The question is, therefore, what in the case of proceedings in liquidation corresponds to an adjudication in bankruptcy? The 87th section says in effect that the sheriff is to keep the proceeds of the sale until he has ascertained whether the debtor against whom the bankruptcy petition has been presented is or is not adjudicated bankrupt on that petition or any other petition of which the sheriff has notice; and, by the 125th section, the appointment of a trustee under a liquidation petition is made equivalent to an adjudication in bankruptcy. I am of opinion that when, on the 16th of December, the creditors dispersed without coming to any resolution, all proceedings under the liquidation came to an end, and it became impossible, under that petition, that a trustee should be appointed. But it is contended that, although it was impossible that a trustee should be appointed, it was possible for the debtor to be adjudicated bankrupt on the declaration of insolvency contained in the petition for liquidation, and that the sheriff ought to have kept the proceeds of the sale until he had seen whether this would be done or not. In my opinion it would be a very inconvenient construction to put upon the 87th section. The effect would be, that the sheriff would have to keep the money for six months, because, at any time within that period, a bankruptcy petition founded on the liquidation petition might be presented against the debtor. It was argued that the 267th rule only requires that notice shall be given to the Court, and not that a petition shall be filed in the event of neglect on the part of the creditors to pass a resolution for liquidation. But I think that it is not competent to the Court to apply the General Rules in such a way as to take away from an execution creditor the rights given him by the Act of Parliament, and that, according to the true construction of the 125th section, it was not contemplated that a debtor who has filed a liquidation petition should be adjudicated bankrupt on the petition for liquidation without a petition in bankruptcy, unless the case came within the 12th sub-section of that section. Whether, under that sub-section, the debtor could be adjudicated bankrupt without a petition in bankruptcy, it is not necessary now to decide, because it appears to me that that sub-

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section only applies to cases in which the creditors have passed a resolution and made some progress in the liquidation. The Chief Judge has very properly decided that an application under the 167th rule must be made by petition. At any rate, in my opinion, an execution creditor cannot have his rights taken away by the Rules.

I am therefore of opinion, consistently with *Ex parte Villars* (1), that as soon as the prosecution of the proceedings in liquidation became impossible, the sheriff, having no notice of any other petition, was justified in paying over the money to the execution creditor, and that it cannot be recovered from him.

With respect to the second point, namely, the payment of the money to the trustee under a mistake of law, I entirely agree with the observations of the Lord Justice.

I also agree that the appeal should be dismissed without costs.

Mr. *Thesiger* asked that the costs of the trustee might be paid out of the estate.

SIR W. M. JAMES, L.J.:—

You must make that application to the Registrar. It appears to me a suitable case for the trustee to have his costs out of the estate, but it is not our practice to make such an order.

Solicitors for the Appellant: Messrs. *Chorley & Crawford.*
Solicitors for the Respondent: Messrs. *Ravenscroft & Hills.*

(1) *Ante*, p. 432.

Ex parte ROWAN. *In re* KIDDELL.

L. J. J. 1874 June 19.

Bankruptcy—Debtor's Summons—Affidavit denying Debt—Bankruptcy Act, 1869, s. 7—Bankruptcy Rules, 1870, r. 22, Form 8.

A trader, who had been served with a debtor's summons calling on him to pay a debt of £3168, filed an affidavit in Form No. 8 in the Schedule to the *Bankruptcy Rules*, 1870, denying "that he was indebted in the amount claimed in the summons." At the hearing of the summons, the debtor admitted that he was indebted to the amount of £650, but denied any further liability:—

Held, that although the form of the affidavit was not consistent with the 7th section of the *Bankruptcy Act*, 1869, yet as it was in the form given in the Schedule it was sufficient; but that as there was a *bonâ fide* dispute the summons ought not to have been dismissed, but ought to have been suspended, without security, till the creditor had established his claim in an action at law.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, sitting as Chief Judge in Bankruptcy.

In the latter part of the year 1873, Mr. *J. D. Kiddell*, a merchant in *London*, employed Messrs. *Rowan, Croft, & Co.*, shipwrights at *Liverpool*, to repair a ship named the *Laura Ann*. On the 4th of February *Rowan, Croft, & Co.* made an estimate of the probable amount of the repairs, which they placed at £1650, to which *Kiddell* agreed, and he afterwards paid two sums, amounting together to £1000, on account of the repairs.

The repairs, however, turned out more extensive than was anticipated, and ultimately *Rowan, Croft, & Co.* sent in a claim for £3168 1*s.* 5*d.*, exclusive of the £1000 already paid.

Kiddell having refused to pay this amount, *Rowan, Croft, & Co.* brought an action for the sum of £3168 1*s.* 5*d.* in the Court of Exchequer, and also, on the 8th of May, 1874, sued out a debtor's summons in bankruptcy for the same amount.

On the 14th of May *Kiddell* filed an affidavit in answer to the debtor's summons in the Form No. 8 of the Schedule of Forms annexed to the *Bankruptcy Rules*, 1870, in which he swore that he "was not indebted to *W. H. Rowan* and *R. Croft* in the amount of the sum claimed in the summons." When the summons came on for hearing *Kiddell* admitted that he was indebted to the amount of £650, but denied his liability for the rest of the claim.

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Under these circumstances the Registrar dismissed the summons, and the creditors appealed from the decision.

Mr. *W. C. Gully*, for the Appellants:—

The affidavit denying the debt was insufficient. The debtor ought not merely to deny that he is indebted in the amount claimed in the summons, he ought either to swear that he is not indebted at all, or else that he is not indebted in such a sum as would support the summons, that is, a sum not less than £50. This is clearly the meaning of the 7th section of the *Bankruptcy Act*, 1869 (1); and although Rule 22 of the *Bankruptcy Rules*, 1870 (2), and the corresponding form, No. 8, in the Schedule have the words "not so indebted" and "not indebted in the sum claimed," those words must be read so as not to contradict the section of the Act. It would be most unreasonable if a debtor could take advantage of the fact of a creditor claiming a few shillings too much to have the summons entirely dismissed. But even if the affidavit is right in form, the Registrar did not exercise his discretion properly in dismissing the summons entirely. The debtor admitted that a certain sum was due, and the summons ought therefore to have been suspended and security given till the action had been tried.

Mr. *De Gex*, Q.C., and Mr. *Clement Higgins*, for the debtor:—

The affidavit was not informal, for it was in Form No. 8, which

(1) Sect. 7 of 32 & 33 Vict. c. 71, enacts that "Any debtor served with a debtor's summons may apply to the Court in the prescribed manner and within the prescribed time to dismiss such summons on the ground that he is not indebted to the creditor serving such summons, or that he is not indebted to such amount as will justify such creditor in presenting a bankruptcy petition against him, and the Court may dismiss the summons with or without costs if satisfied with the allegations made by the debtor, or it may, upon such security (if any) being given as the Court may require for payment to the creditor of the debt alleged by him to be due and the costs of establishing such debt, stay all proceedings on the summons for such time as will be required for the trial of the question relating to such debt."

(2) Rule 22 of the *Bankruptcy Rules*, 1870, is as follows:—"There shall be indorsed on the debtor's summons, in addition to an intimation of the consequences of neglect to comply with the requisitions of the summons, a notice to the debtor that if he disputes the debt and desires to obtain the dismissal of the summons, he must file an affidavit with the Registrar within seven days in the case of a trader, and three weeks in the case of a non-trader, stating that he is not so indebted, or only so to a less amount than £50."

strictly follows the 22nd rule. This form of affidavit has never before been objected to, nor is it unreasonable; for the process of debtor's summons was meant for a test of insolvency, and it was never intended that it should be used where there is a *bonâ fide* dispute about the amount of a mercantile debt like the present. If the creditor knows that there is a dispute about the amount, he ought to take out the summons for such sum as he believes the debtor cannot deny: *Oldfield* v. *Dodd* (1).

The Registrar exercised a sound discretion in this case. At all events it is not a case in which security ought to be required, and if the summons is merely suspended without security, the creditor will be in no better position than he is now. It is therefore the fairest course in such a case to dismiss the summons.

Mr. *Gully*, in reply.

SIR W. M. JAMES, L.J.:—

I am of opinion that the Registrar would have done better in this case if he had simply adjourned the summons, leaving the creditor to take such proceedings as he might be advised. The objection is rather a formidable objection to the form of the debtor's affidavit, and it is very difficult indeed to reconcile that form with the language of the Act of Parliament. No doubt attention will be drawn to it now, and some attempt made under the approaching changes in Bankruptcy to make the Forms and the Rules and the Act of Parliament more harmonious. It is certainly very desirable that the form should be set right. But the form is the form that has been in use ever since the Act came into operation. It is a printed form, and the debtor used that form, and took it before the Registrar, and therefore I think the Registrar was quite right in saying he had a *locus standi* to apply for a dismissal of the summons.

I do not think, having regard to the Act of Parliament and the Rules, that it is absolutely essential that the Registrar should be satisfied that every farthing of the debt claimed in the summons is due, and that the debtor's summons must fail if that is not proved. I do not think that has been the practice, and I do not think it would be consistent with the Act of Parliament, because,

(1) 8 Ex. 578, 17 Jur. 261

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according to Form No. 19, the bond that is required to be given is a bond for "such sum as shall be recovered," and by sect. 9 of the Act the debtor is to give such security as the Court may require for "any debt which may be established against him in due course of law."

It appears to me that in allowing the summons to stand over for the trial no harm will be done to the debtor, because it does not necessarily result in bankruptcy if an adjournment takes place. It is always competent for the debtor, if the verdict is found against him, to get rid of the summons by paying the debt. If security is given by way of bond, then the obligors of the bond have to satisfy the terms of the bond, and pay the amount. If no security is required either by bond or otherwise, then in that case the debtor has simply to pay the debt before any proceedings upon the summons are taken to adjudge him a bankrupt. In the present case there is a *bonâ fide* dispute. There is a heavy claim of £4000 for a debt which the creditor had originally estimated at £1650. It would be for the jury to decide whether there was any alteration in the circumstances by which the liability was enlarged, or whether there was a bargain for £1650 or a bargain to do the repairs for a reasonable price; and there being that *bonâ fide* dispute between the parties as to the amount of the debt, I think that the Registrar was quite right in not requiring any security for it. I think at the same time it would have been right to have allowed the whole matter to stand over to see what a jury would say with regard to the amount, and when the jury had determined that question, such further proceedings might be taken as the parties might be advised.

I think the creditors would have been better advised if they had confined their summons to the £650. I agree with Mr. *De Gex* that it is not quite the object of these provisions of the *Bankruptcy Act*, when there is a *bonâ fide* dispute between the parties, to try a question whether £600 or £3000 is due, but the Act of Parliament does not enable me to dispose of the case on that ground. Therefore the order will be varied by staying the proceedings without security.

Solicitors: Messrs. *Cunliffe & Beaumont*; Messrs. *Gamlen & Son*.

Ex parte LOVERING. *In re* JONES (No. 2).

L. J. J.
1874
June 19, 26.

Bankruptcy—Order and Disposition—Reputed Owner—Goods sold and taken back on hire—Bankruptcy Act, 1869, *s.* 15, *sub-s.* 5.

A draper in *London*, being the owner of household furniture which was in his dwelling-house and shop, signed a written agreement by which he sold the furniture to a furniture dealer and hired it back at a rent of 12*s.* 6*d.* a week. He remained in the use and occupation of the furniture under the agreement for more than four years, and then filed a petition for liquidation, under which a trustee was appointed:—

Held, that the furniture was in the order and disposition of the debtor as the reputed owner at the commencement of the liquidation, and that the trustee was entitled to it.

Lingham v. *Biggs* (1) and *Lingard* v. *Messiter* (2) followed.

Ex parte Watkins (3) distinguished.

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, sitting as Chief Judge in Bankruptcy.

Mr. *E. Jones* was a draper carrying on business at Nos. 36, 38, and 42, *Fulham Road, Kensington.*

By an agreement dated the 30th of July, 1869, and made between *E. Jones*, of the one part, and *G. J. Rook*, a house agent in *King's Road*, of the other part, *E. Jones* agreed to sell certain household furniture in his houses and shop, specified in the schedule (not including any shop fixtures), for £192 12*s.* 6*d.*; and it was further agreed that *Jones* should remain in possession of the furniture, paying for the hire of it 12*s.* 6*d.* a week.

Under this agreement *Jones* remained in possession of the furniture until the 27th of November, 1873, when he filed a petition for liquidation by arrangement, which was agreed to by the requisite majority of his creditors, and Mr. *Lovering* was appointed trustee of his estate.

The trustee claimed the furniture on behalf of the creditors, on the ground that it was in the order and disposition of the debtor at the commencement of the liquidation by the consent of the true owner, within the 15th section of the *Bankruptcy Act*, 1869. The Registrar refused to admit the claim, and the trustee appealed from the decision.

(1) 1 B. & P. 82. (2) 1 B. & C. 308.
(3) Law Rep. 8 Ch. 520.

L. J. J. 1874

Ex parte LOVERING *In re* JONES. (No. 2.)

Mr. *De Gex*, Q.C. (Mr. *Robertson Griffiths* with him), for the Appellant:—

The authorities are distinctly in favour of the presumption that where goods originally belonged to a debtor, and he parts with them to another person, but remains in possession of them till his bankruptcy, the goods are in the order and disposition of the bankrupt: *Lingham* v. *Biggs* (1); *Lingard* v. *Messiter* (2); *Ex parte Castle* (3). The only exception that is made is when a special custom is proved; but there has been no proof of any custom existing among drapers to hire furniture instead of buying it.

Mr. *Winslow*, Q.C. (Mr. *T. Brett* with him), for *Rook*:—

The authorities cited are old cases which were decided before the question of order and disposition had received so much consideration as has been lately given to it, particularly on the point of the goods continuing in the possession of the vendor. The later cases are in our favour, for they shew that the Court will take into account not merely the custom of a particular trade, but the ordinary usages of persons engaged in business: *Hamilton* v. *Bell* (4); *Ex parte Watkins* (5). It has been decided that the law of reputed ownership does not apply in an ordinary case to hired furniture, *Ex parte Emerson* (6), because the custom of hiring and letting furniture is well known; and it can make no difference that the furniture originally belonged to the person who hires it, for that is a fact not known to the world, and which, therefore, could have no effect on his credit. It is not obligatory on us to give evidence of the custom, the onus is on the trustee to make out the reputed ownership: *Shrubrole* v. *Sussams* (7); *Jarman* v. *Woolloton* (8); *Priestly* v. *Pratt* (9); *Ashton* v. *Blackshaw* (10).

Mr. *De Gex*, in reply.

SIR W. M. JAMES, L.J.:—

In this case the debtor was a draper carrying on business, apparently in an extensive way, at Nos. 36, 38, and 42, in the

(1) 1 B. & P. 82.
(2) 1 B. & C. 308.
(3) 3 M. D. & D. 117.
(4) 10 Ex. 545.
(5) Law Rep. 8 Ch. 520.
(6) 41 L. J. (Bkcy.) 20.
(7) 16 C. B. (N.S.) 452.
(8) 3 T. R. 618.
(9) Law Rep. 2 Ex. 101.
(10) Ibid. 9 Eq. 510.

Fulham Road, and he had the usual living rooms above and under the trade part of the houses. He was possessed of the furniture of those rooms, which were furnished in the ordinary way, probably, in which it may be supposed a reputable tradesman's house is furnished. On the 30th of July, 1869, he entered into an agreement with the Respondent to sell him the whole of that furniture, taking it back upon terms of hiring at 12*s.* 6*d.* per week. That agreement, apparently, was known only to the debtor and to the Respondent, and under that agreement the debtor continued in possession, and having the wear and tear of the furniture, and, I suppose, occasionally breaking the glass and other things of a fragile nature, upon that agreement, up to and at the time of his liquidation, because the things were in the rooms at that time. Then a question arose in the liquidation between the trustee and the Respondent, Mr. *Rook*, as to whether these goods were in the reputed ownership of the debtor or not, so as to pass to his trustee. The Registrar, when the case came before him, was of opinion that they had not so passed, and hence this appeal, which was argued before me, sitting alone, this day week, by Mr. *De Gex* on one side and Mr. *Winslow* on the other, who argued it with a commendable brevity, and therefore with corresponding force and clearness; on each side there were only a few cases cited, and therefore they were relevant and important cases.

The argument in substance presented to the Court by Mr. *De Gex* was this, that if those facts, as I have stated them, had been stated to anybody upon a petition thirty or forty, or even twenty years ago, there would not have been the slightest hesitation whatever in answering the case in the affirmative, that the goods were in the reputed ownership of the bankrupt; and Mr. *De Gex* said, if he had been pressed for any authority upon the subject, or for the purpose of shewing that any principle had been established, he would have referred to the case of *Lingham* v. *Biggs* (1) and to the case of *Lingard* v. *Messiter* (2), as containing the principle and giving unanswerably the reasons for so holding; and that he would also have referred to the language of Mr. Justice *Bailey* and Mr. Justice *Holroyd*, particularly in the latter case, as being unquestionable and conclusive authority upon the point. Mr. *Winslow*

(1) 1 B. & P. 82. (2) 1 B. & C. 308.

L. J. J.
1874
Ex parte LOVERING.
In re JONES.
(No. 2.)

did not, in fact, traverse that, but admitted that some years ago, no doubt, that would have been the law of the case; but he said with regard to that, that a change had come over the spirit of the law of recent years, and that persons had begun to think there was a good deal of unjust nonsense in our law of reputed ownership, by which the real owners were sometimes deprived of their property upon an assumption, scarcely ever warranted by the fact, that credit had been given by the people claiming, who probably really never heard of the goods, or thought of them at the time they gave credit to the bankrupt. The answer to that is this, that the law of reputed ownership is statute law, and has been so from the time of *James* I. to the present time, and is part of the existing code of the bankruptcy law. Then it was suggested by Mr. *Winslow* that a great change had taken place in the course of conduct with regard to these matters in the world, so that reputation of ownership no longer arose as it used formerly to do; that persons were now in the habit of leaving goods in the possession of the vendors, and that articles of furniture were now so frequently taken upon terms of hiring, that the mere possession of those things was no longer the cause of a reputation of ownership; and he, secondly, contended that, with regard to the main principle laid down in both those cases to which I have referred, there was a secret change of ownership in the bankrupt; and he further proceeded to argue that both those cases had been overruled by the more recent cases, and especially by a recently-decided case in this Court before the Lord Chancellor and the Lord Justice *Mellish—Ex parte Watkins* (1).

Now, with regard to the first part of that argument, no doubt it is very common now for persons to take furnished houses, and in many cases articles of furniture are taken upon terms of hiring, but I am not at all prepared to say that it is a common thing for a reputable tradesman, who is the owner, apparently, or at all events the rated occupier, of a certain house, and in a large way of business, not to be the owner of the goods and ordinary furniture which are being used and broken and chipped from day to day in his place, but merely to be renting the furniture at an extravagant weekly rent. If it were known that this was the position of

(1) Law Rep. 8 Ch. 520.

a tradesman, I think it would certainly very seriously weaken his credit, both with wholesale dealers and with his banker. This case seems to me to come exactly within the authorities cited. I have referred to the common law cases, where the bankrupt was the owner, and a change of ownership occurred which was not known to the world. The case of *Ex parte Watkins* (1) was not intended in the slightest degree to weaken or overrule these cases, and the constant practice based upon those cases simply shews that the doctrine laid down in them may be countervailed by evidence of any known custom and practice in the particular trade in question, known to the dealers in that trade and known to the bankers and other persons accustomed to have dealings with persons in that trade. In *Ex parte Watkins* it was perfectly well known as the universal practice of the spirit trade, that spirits should remain in the warehouse of the vendor, and in these circumstances it was held that no reputation of ownership arose as to the spirits in the warehouse. But that case could be no authority for determining this case, unless it could be made out, which was not attempted to be done, that there is a practice known in *London*, or anywhere else, under which drapers, or persons who are the owners of furniture in the rooms of the house in which they live, ordinarily sell their furniture to a dealer, and then take it back again upon the terms of paying a weekly rent.

I think, therefore, in this case, that the trustee is right, and that the order of the Registrar must be set aside.

Solicitors for the Appellant: Messrs. *Piesse & Son.*
Solicitors for the Respondent: Messrs. *Newman & Payne.*

(1) Law Rep. 8 Ch. 520.

L. JJ.
1874
July 3.

Ex parte WESTCOTT. *In re* WHITE.

Bankruptcy—Proof on behalf of deceased Partner's Estate—Devastavit by Executor of deceased Partner—Business carried on by surviving Partner.

10 Ch 161 n. 166, 163 — 220 10 App Ca 197. 205-7 16 Ch D 620-1

By articles of partnership between *W.* and *T.*, it was provided that all the then existing capital, including the premises at which the business was carried on, should belong to *W.* *W.*, by his will, appointed *T.* and others his executors, and gave his executors a limited power to carry on the business. *T.* alone proved, and carried on the business at the old premises, and committed a devastavit by misapplying some of the separate property of *W.* *W.*'s estate was insolvent, and was being wound up in Chancery. *T.*'s estate was being wound up under a liquidation by arrangement, in which the joint estate of the late firm was also dealt with :—

Held, that a proof could be sustained in the liquidation on behalf of *W.*'s estate against the separate estate of *T.* in respect of the devastavit, notwithstanding the rule against a partner proving against the separate estate of his co-partner.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, sitting as Chief Judge in Bankruptcy.

By articles of partnership dated the 20th of February, 1854, between *W. White*, *W. Thompson White* his son, and *C. G. Collins*, reciting that the premises at 78, *Watling Street*, in which the business was carried on, belonged to *W. White*; that the business was carried on by *W. White*, *W. T. White*, and *Collins*; that *W. White* was alone entitled to the capital, stock-in-trade, and effects, and that *W. T. White* and *Collins* were entitled only in certain shares and the profits: it was, among other things, stipulated that *W. White*, *W. T. White*, and *Collins* should be partners in the profits of the business for twelve years from the 1st of January, 1854; that *W. White* should provide and withdraw capital at pleasure; that the other partners might bring in such sums as they should think fit, but might not withdraw it without the consent of *W. White*; that the profits should be divided in the proportions therein mentioned; that, in case of the death of the said *W. White* during the partnership, the said partnership should immediately thereupon be dissolved and determined, and the shares of the said *W. T. White* and *C. G. Collins* in the profits and gains of the said partnership should thenceforth belong to

the said *W. White's* personal representatives, or the party or parties to whom the said *W. White* should by his last will and testament have bequeathed such shares, and such business should in the last-mentioned case thenceforth be carried on by the personal representatives of the said *W. White*, or by such person or persons as he might by his last will and testament, or otherwise, appoint for that purpose; and the said *W. T. White* and *C. G. Collins* should remain and continue in the said business to assist the representatives or party or parties appointed as aforesaid for the term of six calendar months from the day of the decease of the said *W. White;* and each of them the said *W. White* and *C. G. Collins* should be entitled to receive from such representatives or party or parties as aforesaid a sum equivalent to his share of profits for six calendar months, according to the profits which might have been made by the said co-partnership for the then last two preceding half years, as appearing on the then two last half-yearly stock-takings, and the sum of £500 in addition, which sums the testator directed to be paid to them accordingly, together with the amount of their respective capital (if any) in the partnership, with interest.

Collins retired, and his share became vested in *W. White.* The partnership was continued between *W. White* and *W. T. White,* on the footing of the above articles, till the death of *W. White* on the 19th of January, 1871.

William White, by his will, gave his real and personal estate to *W. T. White, G. T. White,* and *A. W. White,* upon trust to convert the same into money and stand possessed of the proceeds as to one-fourth for *W. T. White,* as to one-fourth for *G. T. White,* and as to the other two-fourths upon the trusts therein mentioned for the benefit of the testator's two daughters and their issue. And he declared that it should be lawful for, but not obligatory on, his trustees or trustee to delay the sale and conversion of such part of his property as was engaged in his business, or any part thereof, and to make arrangements for carrying on the business, for any period not exceeding two years from his decease, and then to sell the business to his said son *W. T. White,* and he directed that in the meantime his share of the profits should be paid to the persons entitled to the income of his trust estate.

L. JJ. 1874

Ex parte WESTCOTT. *In re* WHITE.

This will was proved in July, 1871, by *William T. White* alone, power being reserved to the other executors to come in and prove.

In December, 1871, certain creditors of the testator, under a covenant entered into by him with them as trustees of the marriage settlement of *William T. White*, filed their bill against the three executors for the administration of the testator's estate. On the 7th of March, 1872, a receiver was appointed of the testator's estate.

William T. White carried on the testator's business with the testator's assets till the 2nd of March, 1872, on which day he filed a petition for liquidation by arrangement in the Court of Bankruptcy, under which a trustee was appointed, who was afterwards made a party to the bill in Chancery by amendment.

Various questions had arisen in the course of the proceedings in the Bankruptcy and in the Chancery suit, in the reports of which the facts are stated in greater detail (1). The present appeal related to a claim by the receiver of the estate of *W. White*, the testator, to prove against the separate estate of *W. T. White* for moneys alleged to have been received by *W. T. White* after the death of his father, and as his executor, out of property of the testator not embarked in the business, up to the time of the institution of the proceedings in liquidation, and to have been misapplied by him. The principal part of the receipts consisted of rents which the executor had received from separate property of the testator and had employed in the business. One item was a charge for occupation rent.

The Registrar refused to admit the claim, considering that it came within the rule that a partner could not prove against his co-partner's separate estate until all the partnership debts had been paid. The receiver appealed from this decision.

Mr. *Hemming*, for the Appellant:—

The Registrar decided the case under a misapprehension of the rule on which he relied. I admit that with regard to any property properly employed in the business, the *cestuis que trust* under

(1) See *Morley* v. *White*, *In re White* (Law Rep. 8 Ch. 214); *Morley* v. *White* (Law Rep. 8 Ch. 731); *Ex parte Morley* (Law Rep. 8 Ch. 1026).

his will could not prove. But this claim is in respect of property of the testator which was not embarked in the business, and which it is not pretended that his executor, *W. T. White*, had any right to employ in the business, and he committed a devastavit in so doing. The receiver, therefore, has a right, on behalf of the *cestuis que trust*, to prove against *W. T. White's* estate for the devastavit: *Ex parte Garland* (1); *Ex parte Butterfield* (2). Being a devastavit it is a debt originating with the breach of trust, and never was a debt from one partner to the other.

Mr. *De Gex*, Q.C., Mr. *Winslow*, Q.C., and Mr. *Finlay Knight*, for the trustee of *W. T. White's* estate:—

The Registrar's decision is borne out by the case on which he relied, namely, *Ex parte Bass* (3). The sums for which this proof is tendered are only some items in voluminous accounts. Until they are completed, it is impossible to say on which side the balance will be.

[The LORD JUSTICE JAMES:—There was no power to employ separate assets in the business. The simple question is whether there can be a proof for a devastavit.

The LORD JUSTICE MELLISH:—This was not a debt due to the partner, but a debt incurred to his estate after the partnership had ceased to exist.]

With respect to one item, at all events, namely, for occupation rent, the proof cannot be supported, for the executor carried out the intention of the testator in carrying on the business at his premises in *Watling Street;* and it was therefore no devastavit for the executor to occupy those premises.

A reply was called for only as to the item for occupation rent.

Mr. *Hemming* submitted that it was undesirable to discuss one selected item, when it was clear that the items generally must go back for further investigation, and the decision appealed from went simply on the general question of principle without discussing particular items. He was prepared, however, to argue the point if desired.

(1) 10 Ves. 110. (2) De G. 570. (3) 36 L. J. (Bkcy.) 39.

L. JJ. 1874 *Ex parte* WESTCOTT. *In re* WHITE.

SIR W. M. JAMES, L.J.:—

The matter must go back to the Registrar with a direction that the receiver is at liberty to prove in respect of a devastavit by the executor. The rule is clearly laid down in Lord *Cottenham's* judgment in *Ex parte Butterfield* (1). There will be no costs of the appeal.

SIR G. MELLISH, L.J., concurred.

Solicitors for the Appellant: Messrs. *Tyas & Huntington.*
Solicitor for the Respondent: Mr. *W. Bristow.*

(1) De G. 570.

In re HARRISON.

L. C.
1874
July 29.

Patent—Rival Applicants—Priority—Date of Patent.

Applications were made for two patents for inventions alleged to be similar. The second applicant obtained a patent. The first applicant then presented a petition to have the Great Seal affixed to letters patent for his invention, alleging that his delay had been caused by the representations of the second applicant, and also that the inventions were not similar.

The Lord Chancellor examined the provisional specification of the first applicant, and the complete specification of the second applicant, and finding no substantial similarity between the inventions, directed the letters patent of the first applicant to be sealed.

JAMES HARRISON, the Petitioner in this case, on the 29th of January, 1874, applied for letters patent for improvements in the processes of evaporation, &c., and duly filed his provisional specification. On the 4th of February, *Henry Joseph West*, the Respondent, applied for letters patent for improvements in the production of ice, and on the 24th of March, whilst, as *Harrison* alleged, his proceedings were delayed by *West's* representations, *West's* letters patent were sealed, and bore date the 4th of February. *Harrison* then applied to have the Great Seal affixed to his letters patent. *West* filed notice of objections: that *Harrison* was not the first inventor; that his application was in fraud of *West;* and that *Harrison's* invention was the same as that for which *West* had obtained a patent.

Harrison then presented his Petition to have the Great Seal affixed to his letters patent.

Mr. *Harrison*, in person, argued that he had, by the conduct of *West*, been prevented from obtaining his letters patent. He also contended that there was no similarity between the inventions.

Mr. *Aston*, Q.C., and Mr. *Lawson*, for *West*, contended that the matter must either be referred to the law officer, as in *Ex parte Manceaux* (1), or the patent must, as in *Ex parte Bailey* (2), be dated as on the date of the application for the Great Seal. We cannot

(1) Law Rep. 6 Ch. 272. (2) Law Rep. 8 Ch. 60.

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see the provisional specification of the Petitioner, but we believe that his invention and ours are to some extent identical, and then a second patent cannot be granted: *Ex parte Bates & Redgate* (1); which was followed in *Ex parte Bailey* (2) and *Ex parte Henry* (3).

During the argument His Lordship sent for the provisional specification of *Harrison's* patent.

LORD CAIRNS, L.C.:—

The course I propose to take is this. I do not mean to lay down any rule that, upon an application for the Great Seal to be affixed to a patent, it becomes, as a matter of course, the duty of the holder of the Great Seal to depart from the usual course of sealing patents in order, in the first place, to ascertain whether the subject-matter is or is not to any particular extent identical with an invention protected by another patent, and I have heard nothing in this case which ought to lead me, by any special circumstances, to make an exception to the general practice. But, at the same time, the matter has been heard before me; I have looked into the Petitioner's provisional specification, and into the complete specification of the Respondent, and I am bound to say that upon a slight examination I do not see anything like similarity between the inventions.

I will, however, take an opportunity of reading the specifications more carefully, and if I find no substantial similarity between the inventions, then the patent will be sealed in the usual way, and the Respondent will pay the costs of the application. If, on the other hand, I find a similarity, then I shall take the course which has been taken in other cases, and allow the patent to be sealed, but dated as of the date of the application for the Great Seal.

The following order was afterwards made:—

Order that the letters patent applied for by the Petitioner and mentioned in the said warrant be sealed to him as of the 29th day of January, 1874, and that

(1) Law Rep. 4 Ch. 577. (2) Law Rep. 8 Ch. 60.
(3) Law Rep. 8 Ch. 167.

the time for filing the Petitioner's final specification thereon be extended until the 29th day of August, 1874; and that the Respondent, *Henry Joseph West*, do pay to the Petitioner, *James Harrison*, his costs occasioned by the said notice of objection and of this application and consequent thereon, such costs to be taxed by the Taxing Master of the Court of Chancery.

L. C. 1874 *In re* HARRISON.

Solicitor for *West:* Mr. *J. H. Johnson.*

In re GETHING.

L. C. 1874 *July* 29.

Rival Patents—Same Date—Witnesses.

Where rival applicants had applied on the same day for patents, and had afterwards mutually agreed to withdraw opposition, letters patent bearing date the day of application were granted to one applicant, although letters patent bearing that date had already been granted to the other.

On the hearing before the Lord Chancellor of a petition for the Great Seal to be affixed to letters patent, witnesses may be examined *vivâ voce.*

IN this case the Petitioners, *Gething, Jenkins,* and *Gardner,* and the Respondents, *Hopkins, Rees,* and *Thomas,* both applied for patents on the 3rd of March, 1874. On the 7th of April both applications were to come before the law officer. The agents of each side met on that day, and verbally agreed that neither would oppose the application of the other. This agreement, as the Petitioners contended, included every stage of the proceedings; but, as the Respondents contended, referred only to opposition before the law officer.

On the 8th of April the Petitioners applied for the Great Seal to be affixed to letters patent for their invention. On the 20th of April the Respondents left notice of objections; the objections being that the alleged invention of the Petitioners was derived from one or other of the Respondents, and was identical with the invention for which the Respondents had applied for letters patent.

On the 21st of April the Great Seal was affixed to letters patent granted to the Respondents and dated the 3rd of March.

This was a Petition by *Gething, Jenkins,* and *Gardner,* that,

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In re GETHING.

notwithstanding the objections, letters patent for their invention might be sealed.

Mr. *Roxburgh*, Q.C., and Mr. *Langley*, for the Petitioners, contended that the Respondents could not now oppose, having agreed to withdraw their opposition.

Mr. *Aston*, Q.C., and Mr. *C. James*, for the Respondents, said that a second patent for the same invention could not be granted: *Ex parte Bates & Redgate* (1); *Ex parte Bailey* (2).

As to the actual agreement between the agents, the affidavits were conflicting, and the Lord Chancellor suggested that the agents who had made them should be called and examined *vivâ voce*.

The agents on both sides were accordingly examined in Court.

LORD CAIRNS, L.C., commented on the evidence, and came to the conclusion that the Petitioners were right in considering that the Respondents had agreed to withdraw opposition at all stages. The patent must be sealed, and must be dated as if there had been no opposition; that would be on the same day as that on which the other patent was dated. The costs must follow the decision, and be paid by the Respondents.

Agents: Mr. *T. H. Smith*; Mr. *Gardner*.

(1) Law Rep. 4 Ch. 577. (2) Law Rep. 8 Ch. 60.

In re ADANSONIA FIBRE COMPANY.

MILES' CLAIM.

L. JJ.
1874
July 30, 31.

Bills of Exchange—Partnership—Liability of Firm.

Four firms, *F. & Co.*, *M. & Co.*, *M. & L.*, and *A. & Co.*, associated themselves in a trading adventure, under an agreement which provided "that the finance of the business be carried on by acceptances of the several parties interested as may from time to time be arranged." The association was not registered, nor was its existence made known to the world, though it was known as the *A. F. Company* among its members. The adventure had, before the association was formed, been carried on by *F. & Co.*, in whose name it continued to be carried on. An order having been made for winding up the association, an application was made to prove on ten bills of exchange, drawn by *M. & Co.* for the purposes of the adventure, and accepted some by *F. & Co.*, some by *M. & L.*, and some by *A. & Co.*

Held (reversing the decision of *Malins*, V.C.), that the proof could not be admitted, for that the bills bound only the individual firms by which they were drawn and accepted.

THIS was an appeal by the official liquidator of the *Adansonia Fibre Company* from an order of Vice-Chancellor *Malins*, admitting Messrs. *Miles & Co.* to prove against the company on five bills of exchange of which they were the holders, and directing an inquiry whether any and which of five other bills held by them were drawn and accepted for the purposes of the company.

The company was an association of four *London* firms, which united in an adventure for trading with the West Coast of *Africa*. The persons interested were *C. J. Fox*, who carried on business under the firm of "*Fox Brothers*," *William Malcolm* and *S. S. Malcolm*, under the firm of "*Malcolms & Co.*," *William Lucas Merry* and *George Lloyd*, under the firm of "*Merry, Willis, & Lloyd*," and *W. J. Adams*, *A. W. Adams*, and *F. Edenborough*, under the firm of "*W. J. & A. W. Adams & Co.*"

A memorandum of agreement, dated the 18th of September, 1871, between these firms, was drawn up and signed in the partnership names of the several firms. It contained (among others) the following clauses:—

"1. The business to be carried on under the style of *Fox*

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Brothers, who shall keep separate books for the purpose and separate clerks."

"3. That each party to this agreement be liable in respect of the business in proportion to his share in the undertaking, and in the event of being under cash advance, he shall receive £5 per cent. interest for the same, but it is understood and agreed that the finance of the business be carried on by acceptances of the several parties interested as may from time to time be arranged.

"4. That stock be taken at least once a year, and the profits or losses arising out of the trading be apportioned as follows, viz., Messrs. *Fox Brothers* 25 per cent., Messrs. *Malcolms & Co.* 25 per cent., Messrs. *Merry, Willis, & Lloyd* 25 per cent., Messrs. *W. J. & A. W. Adams & Co.* 25 per cent."

"8. That after writing off 25 per cent. for depreciation of plant at the end of each year, 50 per cent. of the profits be divided amongst the undersigned, the remaining 50 per cent. to form a working capital for the business."

The association was known amongst its members as "*The Adansonia Fibre Company*," but it was never registered, nor was the partnership made known to the public.

The adventure had for some time previously been carried on, first by *Fox Brothers*, and afterwards by them and *Malcolms & Co.*, the name of *Malcolms & Co.* not appearing.

None of the firms brought in any cash, but the business was conducted by means of bills of exchange drawn by one or other of the four firms upon another of them. And it appeared that they were drawn and accepted without any regard to the proportions in which the several firms were interested in the adventure, and chiefly with regard to the facility with which they might be discounted, it being contemplated by all the four firms that the acceptances would ultimately be paid out of the assets of the association. The financial department was managed by *Fox Brothers*, who arranged what bills should be drawn and accepted for the purposes of the adventure.

On the 22nd of February, 1873, an order was made, on the petition of *Merry, Willis, & Lloyd*, for winding up the association. The constituent firms had also become insolvent.

The question now was, whether *Miles & Co.* were entitled to prove against the company upon ten bills of exchange of which they were the holders for value, having discounted them in the ordinary course of business. These bills amounted in the whole to £10,291, and there was evidence that they had been drawn for partnership purposes, but there was nothing upon them to shew this, and *Miles & Co.*, when they discounted them, did not know of the existence of the company. They were all drawn by *Malcolms & Co.*; four of them were accepted by *Adams & Co.*, three by *Merry, Willis, & Lloyd*, and three by *Fox Brothers.*

Vice-Chancellor *Malins* (1), being satisfied on the evidence that *Malcolm & Co.*, *Fox Brothers*, *Adams & Co.*, and *Merry, Willis, & Co.* I take it for granted that they were all in a tottering condition, for every one of them has become bankrupt since 1871, but they were then mercantile firms in the city of *London.* They agreed among themselves that they would embark in a joint enterprise, and that they should be associated together in trading on the coast of *Africa* in a product called "African Fibres," and they agreed that this particular adventure should be called the *Adansonia Fibre Company.* But it never was registered; it was merely an arrangement amongst themselves, and it having signally failed, a petition was presented in February, 1873, to wind up the company. It was the petition of *William Lucas Merry* and *George Lloyd*, of 118, *Cannon Street*, in the city of *London*, merchants, carrying on business in partnership under the style or firm of *Merry, Willis, & Lloyd.* That is one of the four firms. It stated the embarrassment of the undertaking, and it prayed for a winding-up order. That was a case which was very fully argued, because there was great difficulty felt as to whether it could be made out that there were eight partners; and upon the 14th of February I made an order to wind them up. I subsequently ap-

(1) 1874. June 27. WM(1874)150

SIR R. MALINS, V.C.:—

This is a case, according to my view, of very great commercial importance. It has been very fully and ably argued; and although I have declined this morning, upon general principles, to hear counsel representing one of the four firms separately and counsel representing creditors of the company, it has not been from any want of inclination on my part to hear them, but because I cannot, upon general principles, open the door in these winding-up cases to creditors, who are represented by the official liquidator, and let them appear to argue for themselves, when they have concurred in appointing a person who competently represents their interests.

As to the appointment of a creditors' representative, which requires a special case to justify it, no such special case is made out here, and I cannot accede to its being done. However, as the case has been so fully argued, I think the creditors may be very well satisfied that their interests have not in the slightest degree suffered by their not appearing.

The point I have to decide is a peculiar one. In the year 1871 there were four mercantile firms in *London*—

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five of the bills had been drawn and accepted for the purposes of the company, admitted the proof as to them, and directed an inquiry whether any and which of the other five, had been drawn

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pointed Mr. *Ball*, of *Quilter*, *Ball*, & *Co.*, official liquidator, who has instructed counsel to argue the case on his behalf.

The case is this: Messrs. *Miles & Co.*, very eminent bankers at *Bristol*, had discounted bills to the amount of £10,291 5*s.* 4*d.* Some of those bills are drawn by one of the four firms and accepted by another; others are drawn by others and accepted by others; the changes are all amongst the four firms, either as drawers or acceptors. Messrs. *Miles & Co.* most unquestionably discounted these, and, as I understand, without the slightest knowledge that these four firms had associated themselves together for the purpose of carrying on this fibre trading. In the name of the *Adansonia Fibre Company* they had never traded. Their bills have all been dishonoured. As I have said, all these four firms have been bankrupt, and *Miles & Co.* hold their acceptances for the amount of upwards of £10,000. Now, having discovered the real transaction, Messrs. *Miles & Co.*, upon this application, say, "True it is that when we discounted these bills we knew nothing of any one but the firms who appeared upon the face of the bills either as drawers or acceptors, yet now we have discovered the real transaction, we are entitled to go against the association on whose behalf these bills were accepted."

The question that has to be decided upon the claim of *Miles and Co.* is, whether they are to be creditors of the company, or whether they are not.

The case appears to have been before me on Saturday, the 25th of April, and resumed on the following Saturday, the 2nd of May, and in the interval I very carefully read the affidavits, and very carefully examined and considered all the authorities cited; but I confess, after all I have heard, it does not appear to me that any great rank of authorities is necessary to be resorted to for the purpose of deciding this case.

What are the general principles with regard to the liability of parties upon bills of exchange? Of course no one will deny that every man whose name is on a bill, either by his own signature or by his authority, is liable upon it. There are many cases in which persons whose names are not on bills are quite as liable. I may put the case of a mercantile firm, or a banker carrying on trade in a particular name—call it *Smith & Co.* *Smith & Co.* may have traded for a century under that name, when it is perfectly well known to everybody that there is no *Smith* in the concern; there are six partners in it, and it is very well known who they are. The obligation and acceptance is in the name of *Smith & Co.*; it is perfectly clear, although the person who accepted the bill did not know the fact at the time, that he is entitled to resort to any one of the six. They traded under the name of *Smith & Co.*, and he who accepts in their name must be considered as their agent, acting on behalf of all of them, and every one of them is plainly liable for the acceptance so given. I take it, if I can ascertain that any person trading, not in his own name, but in the name of another person or of other persons, has authorized them to trade on his behalf in that name, and it is incidental to that business to give acceptances, as the Lord Chief Justice

and accepted for the purposes of the company in pursuance of the agreement of the 18th of September, 1871. The liquidator appealed.

Cockburn expressed in the case of *Edmunds* v. *Bushell* (Law Rep. 1 Q. B. 97)—that is an authority to carry on the business, an authority to do all acts necessary to enable it to be carried on with advantage. If I find that *A.* has authorized *B.* to carry on business in *B.*'s name on *A.*'s behalf, and for that purpose to accept bills of exchange for him either by express authority or by any authority necessarily implied from the nature of the business, it is in point of law perfectly clear that, although *A.*'s name does not appear upon the bill, he can be sued at law for it, and he is as much liable as if his own handwriting were upon that bill.

Now that, I understand, is a principle which will not be controverted. If it is, it is completely answered by the case of *Edmunds* v. *Bushell*. That was an action brought against the public officers of a joint stock bank; here it is a private concern. There it was a bill that had not been discounted; here the bill had been discounted. *Edmunds*, the public officer of the bank, sued *Bushell* and *Jones*, who were straw-hat manufacturers. *Jones*'s name did not appear upon the bill. *Jones* appointed *Bushell* as his agent to carry on business on his behalf. He told *Bushell* expressly that he was not to accept bills, and he refused to give him an authority to do so. Nevertheless, in defiance of that, *Bushell* did accept bills, and the question was whether *Jones* was liable upon the bills. The decision was that he was liable, although he had prohibited *Bushell* from accepting bills, because accepting bills was a necessary incident to properly carrying on the business, and therefore, the business being *Jones*'s business, *Jones* was liable for every bill that was accepted by *Bushell* for the purpose of carrying on that business.

Now, applying those principles to this case, what is the argument here? It is not in dispute—it is fortunately reduced into writing—that these four firms entered into a memorandum of agreement dated the 18th day of September, 1871. It stands thus: "Memorandum of agreement entered into this 18th day of September, 1871, between the undersigned"—the undersigned are the four firms—"who have associated themselves for the purpose of carrying on the trade to the West Coast of *Africa* established by Messrs. *Fox Brothers*, of 45 and 46, *Great St. Helen's*. The business to be carried on under the style of *Fox Brothers*, who shall keep separate books for the purpose and separate clerks. It is understood and agreed that the finance of the business be carried on by acceptances of the several parties interested, as may from time to time be arranged; that stock be taken at least once a year, and the profits and losses arising out of trade to be apportioned as follows: First of all, *Fox Brothers* are to have £1000 a year for conducting the business, and then they are to have 25 per cent., and the other firms so much"—they are to divide amongst them the profits which shall be made; the business was to be carried on in those names—"and it is provided that acceptances are to be given by the different firms." None of these firms ever contributed any capital; in fact, the whole of the business of the association was conducted by means of acceptances of drafts of the several firms interested as should from time to time be arranged. The result is, therefore,

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Mr. *Cotton*, Q.C., and Mr. *Rodwell*, for the Appellant:—

The mere fact that a bill is drawn for partnership purposes will not make the partnership liable to be sued on it: it is necessary

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that they agreed to carry on business as partners—eight of them; they do not agree that it was to be carried on in the name of the company, as it might have been, but they agreed it was to be carried on in the name of the four firms, and whether an acceptance is by the firm of *A. & Co.*, or *B. & Co.*, or *C. & Co.*, or *D. & Co.*—sometimes it is one and sometimes it is another—whichever it may be, those acceptances, representing the business of the company, are to be deemed the undertaking of the company, are the liabilities of the company, and are to be met and paid out of the assets and produce of the company. What is this but an agreement by eight men that they will carry on their business sometimes in the name of one of them, sometimes in the name of another—sometimes *A.*, sometimes *B.*, sometimes *C.*, and sometimes *D.*; but whether it was one or the other, so long as it was carried on in those names, the very articles provide in detail that the acceptances given in those names shall be deemed to be the acceptances of the association—that is, the acceptances of the eight; in other words, that the eight men shall trade sometimes in one name and sometimes in another—it being agreed that all these are partnership transactions for which they are all to be equally liable. Whatever the losses may be, and whatever the gains may be, they are to be borne or divided amongst the parties in certain definite proportions. Therefore I take it the result is, that this is an agreement that, whatever firm—whether one or other is the drawer and the other the acceptor—whatever undertakings are entered into in that way, they are to be deemed as a trading, for which the eight associated together are to be liable. This appears to me to fall within the case which I have already referred to, and it also falls within all the cases which have been cited. No doubt the authorities go to shew that an acceptance, in order to bind the firm when there is an irregularity shewn, must be given in the name of the firm. One of the cases cited was that of *Kirk* v. *Blurton* (9 M. & W. 284), where it was decided that one partner can bind another only by an acceptance in the name of the firm. Where the business was carried on in the name of *John Blurton*, "an acceptance by a partner in the name of *John Blurton & Co.*" was not binding. But the acceptance there was not for the benefit of the firm; it was a fraudulent use of the name, and not being the usual name, Mr. *Blurton* was not bound, because he traded under the name of *Blurton* only. Therefore, in order to bind, it must be an acceptance in the proper name of the firm, and those persons who took the dishonoured acceptances not in the usual trading name, took with notice of all defects and of any irregularity, and they could not derive any advantage from it. No such principle applies here, because here the express contract of the eight parties is, that whichever of the four firms' name is used, if it is for the purpose of their undertaking, they shall all be severally liable. What does this come to? It is an association by these eight men; it is an association by which they agreed to carry on their trade in particular names; they did not find any capital; it was all to be done

for that purpose that the partnership name should appear on the bill: *Byles* on Bills (1); *Nicholson* v. *Ricketts* (2); *Kirk* v. *Blurton* (3). The decision in *South Carolina Bank* v. *Case* (4) went

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by bills of exchange—everything was done by acceptances, which were sometimes taken by one and sometimes by another, and all the acceptances that were drawn by one firm were to be binding upon them; consequently it falls within the common principle of persons who are associated together for the purpose of trade, and who agree to carry on in particular names the business entered into on their behalf in those names, and if it is a partnership it is a liability which binds them all. Therefore, in my opinion, all the bills that were drawn by one of the four firms and accepted by another, whoever it may be, provided that they are in the contract of the 18th of September, 1871, and accepted for the purpose of the business, and used for the purpose of the business, are binding upon the eight—that is, are binding upon the company, which I have decided to be a company, by making an order to wind up, and which order stands unreversed and unappealed.

That brings me to the question, which of those bills are they liable for. These firms no doubt traded in a large way, and gave many acceptances. Now, the evidence upon that subject at present, as to some of the bills, is rather defective. I will take the first. The bill claimed by *Miles & Co.*, which they have discounted, was a bill drawn by *Malcolm & Co.*, dated the 20th of August, 1872, and accepted by *W. H. Adams & Co.*, and fell due on the 23rd of December, 1872, for £1000. As to that bill, it may be a bill drawn by *Malcolm & Co.* upon *Adams & Co.* for their own individual transaction. Was it or was it not so? The fact that it was drawn for the undertaking on behalf of the company, I think, is conclusively proved by its being regularly entered in the books of the company. As I understand, there are five bills for £1000; the one I am observing upon was regularly entered in the books of the company. The next I come to is one of the same date, upon the same parties, and the same amount, £1000. That is also entered in the company's books. It is in the books kept by *Fox Brothers*, in pursuance of the articles of the 18th of September, 1871, for doing which they were to have £1000 a year out of the profits of the business. There are eight other bills drawn and accepted by one or other of the four firms, some of which are entered in the books of the company and some are not, but the result is, as to the bills amounting to £10,291, one half of the number, that is, five are in the books of the company and five are not. The amount appearing in the books is about half the amount of the whole bills. It appears, also, that these bills are, in their regular course of business, entered in the books of the company as their acceptances. That is conclusive evidence that those five bills were acceptances by those firms on behalf of the company. Those bills, therefore, I shall, without any further inquiry, admit to be bills for which the company is liable.

With regard to the other five bills which do not appear in the books of the

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(1) 10th Ed. p. 43.
(2) 2 E. & E. 497.
(3) 9 M. & W. 284.
(4) 8 B. & C. 427.

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on the ground that the name of the person who signed was the name of the firm as regarded the business in *America: Emly* v. *Lye* (1). *Edmunds* v. *Bushell* (2), which was relied on in argument below, has no bearing on the question. The name of the firm was there used, and the only question was whether there was authority to use it. The reason why a dormant partner is liable on a bill of exchange is that the other partners have authority to use the partnership name which includes him.

[The LORD JUSTICE MELLISH:—If the company had had a known name there would have been no doubt about the case, but it seems open to contend that the company carried on business under a number of names.]

That does not appear to have been the intention of the parties.

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company, I think the proper course will be to have an inquiry whether they were in fact bills drawn by one firm and accepted by another for the benefit and use of this company, that is, for the eight partners. If that inquiry is answered in the affirmative, then the same rule will follow as to them.

There is another point which has been much argued, but which the view I have taken of the case has rendered it unnecessary to give any positive opinion upon—that is, whether the doctrine of *Ex parte Waring* (19 Ves. 345) and *Powles* v. *Hargreaves* (3 D. M. & G. 430) is applicable to this case. I am very much disposed to think, if it were necessary to decide it, I should come to the conclusion that the principle laid down in *Powles* v. *Hargreaves* and *Ex parte Waring* is applicable. As I understand the doctrine of those cases, it is, that wherever a bill is discounted, and the person who discounts the bill has no knowledge whatever that there is security for its payment, and he discounts it upon the faith of the drawers, acceptors, and indorsers, when, after the insolvency of the parties, he discovers that security exists for the bill, he is entitled to the benefit of the security, although he did not bargain for it in any way. Therefore these four firms having become bankrupt, and Messrs. *Miles & Co.* discovering that there were securities for the payment of the bills, taking the *Adansonia Company* as security, I am inclined to think, upon the authority of those cases, that they would be entitled to the security, whatever it was, for the payment of the bills; but I do not think it necessary to decide that point.

My decision rests upon the other ground, that these are bills accepted by the four firms under the express authority of the articles of the 18th of September by those authorized to use the name on their behalf, and consequently the company are liable upon them.

The costs of the official liquidator and of Messrs. *Miles & Co.* will be allowed out of the estate.

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(1) 15 East, 7.

(2) Law Rep. 1 Q. B. 97.

(18 C 18 June 1083.

Clause 3 shews that they meant the bills to be the liabilities only of the firms that drew and accepted them. The judgment and arguments in *Beckham* v. *Drake* (1) illustrate the inflexibility of the rule that in bills of exchange you are not to look after undisclosed principals: *Lindley* on Partnership (2); *Ex parte Bolitho* (3); *Ex parte Hunter* (4). The case most resembling the present is *Nicholson* v. *Ricketts* (5). The bills accepted in the name of "*Fox Brothers*" must stand on the same footing as the rest, the existence of the company being unknown, so that there cannot have been an intention to deal with the company.

Mr. *Higgins*, Q.C., and Mr. *Robinson*, for *Miles & Co.*:—

This case differs from all those referred to by the circumstance that the company has had no name. The agreement was in substance that the company should contract liability in the names of the several firms; the name of each firm was, therefore, for the occasion, the name of the company. If the contention of the other side is correct, no bill could possibly be drawn so as to bind the company.

SIR W. M. JAMES, L.J.:—

The question before us relates solely to bills of exchange. Whatever other liability may attach to the members of this association, which, for the purpose of winding up, has been called the *Adansonia Fibre Company*, is not before us.

Now it is the law of this country, and it has always been the law of this country, that nobody is liable upon a bill of exchange unless his name, or the name of some partnership or body of persons, of which he is one, appears either on the face or on the back of the bill. That is the clear law of this country. It was decided in *Nicholson* v. *Ricketts*, if authority be required for such a proposition, that an association which is absolutely without a name has no name by which it can draw, accept, or indorse bills of exchange.

It was suggested, and the argument appears to have prevailed

(1) 9 M. & W. 79; 11 M. & W. 315.
(2) 3rd Ed. p. 360.
(3) Buck, 100.
(4) 1 Atk. 223.
(5) 2 E. & E. 497.

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with the Vice-Chancellor, that where the members of such an association, or the firms constituting such an association, for the purposes of that association, draw or accept bills in their individual names or in the names of their partnerships, that for that purpose, and for the purpose of doing equity, or of reaching the real principal, it might be assumed that the name of the partner upon the bill, or the name of the partnership upon the bill, might be considered as being *pro hac vice* the name of the association. That, in my opinion, is a mere *fictio juris*; and although it used to be said *in fictione juris consistit æquitas*, I think that in these prosaic days, and in the old age of the Court, we do not indulge in those flights of imagination which our predecessors did.

I am of opinion that there is no evidence whatever that any name upon any one of these bills was intended to represent, or in fact did represent, any association or body of persons whatever, except the particular association whose particular trade name it is.

SIR G. MELLISH, L.J.:—

The question in this case is whether the holders of ten bills are entitled to prove against the *Adansonia Fibre Company*, which is being wound up in this Court.

That company consisted of the members of four firms, and each of the bills in question purports upon its face to be drawn by one of the four firms on another of those firms. If the case stopped there, it is of course perfectly clear that there can be no proof against the company. It is the simple case stated by Mr. Justice *Crompton*, in *Nicholson* v. *Ricketts* (1), as a case which was perfectly clear and free from doubt, "Where *A.*, *B.*, and *C.* are in partnership and arrange that *C.* shall draw bills in his own name on *A.* and *B.*, I think it impossible to say that *C.'s* signature to such bills binds the others."

Then, in order to prove that it does bind the others, in my opinion it must be made out that the others had given authority either to the persons who put their names as the drawers or the persons who put their names as the acceptors to use those names which were so put upon the bills as the names of the whole *Adansonia Fibre Company*. The question is whether that is made out.

(1) 2 E. & E. 526. 6 Jur. N.S. 427

The Vice-Chancellor thought it was made out by the articles of partnership themselves. Now, by the articles of partnership it is stated, "Memorandum of agreement made and entered into this 18th day of September, 1871, between the undersigned, who have associated themselves for the purpose of carrying on the trade to the West Coast of *Africa* established by Messrs. *Fox Brothers*, of 4, 5, and 6, *Great St. Helen's*. (1.) The business to be carried on under the style of *Fox Brothers*, who shall keep separate books for the purpose, and separate clerks." Now, it is not necessary to say to what extent that goes; but, at any rate, if it makes any name whatever the name of the firm, the only name it can make the name of the firm is the name of "*Fox Brothers*." Then it goes on: "The business to be taken over as from the 31st day of December last;" and then comes what is really the material clause: "That each party to the agreement be liable in respect of the business in proportion to his share in the undertaking, and in the event of his being under cash advance he shall receive 5 per cent. interest for the same; but it is understood and agreed that the finance of the business be carried on by acceptances of the several parties interested as may from time to time be arranged."

The question is, what is really the meaning of those words, "the finance of the business be carried on by acceptances of the several parties interested as may from time to time be arranged"? The Vice-Chancellor thought that according to the true construction of those words they meant that the name of each of the four firms might be used for the purpose of accepting bills for and on account of the partnership so as to bind the partnership, and that it amounted to an express agreement by the four that they would carry on business and accept and draw bills for the benefit of the four in the name of whichever of the four it might be most convenient to do so. But in my opinion it is quite clear that that is not the true construction of the agreement. When a deed of partnership is drawn, and the articles of partnership provide for the raising of capital in order to carry on the business of the partnership, it is competent to the partners to raise that capital in any way they please. If they please, they may say that the capital required to carry on the partnership shall be borrowed on the credit of all the partners. If the money is borrowed upon the

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credit of all the partners, the whole partnership may be liable. It is equally competent for the partners to say, "We will each of us bring in a sum of £10,000, or any other sum that may be agreed on, in order to raise capital for the purpose of carrying on the business of the partnership." That is an agreement by each with all the others that he will bring in that sum; and it is also quite competent to them to say, "Instead of bringing in money, which it is not convenient to us to do, each of us will give our individual acceptance, in order that, upon the credit of our individual acceptance money may be raised for the purpose of the partnership." In my opinion it is perfectly clear that that is what is the true construction of the agreement. The word "several" seems to me to make it quite plain. "The finance of the business shall be carried on by acceptances of the *several* parties interested." So far from meaning that the acceptances of the several parties shall bind all the firms, it means exactly the contrary—that each of the firms in partnership is to raise its share of the capital which may be wanted for the benefit of the whole company by giving its individual acceptances.

That being the true meaning of the agreement, I do not think that there is any evidence to shew that the business as actually carried on by the partners differed at all from what was contemplated by the articles of partnership. No doubt this clause in the articles does not expressly provide how the bills are to be drawn; it only says that funds are to be raised by each individual member giving his acceptance. They might have drawn the bills in any way they pleased. If a bill had been drawn in the name of *Fox Brothers* there might have been a question (I do not say how it would have been decided) whether the name of *Fox Brothers* was not used to designate all four. But none of the bills are drawn in the name of *Fox Brothers,* and when we find that the bills were drawn in the names of some of the others, it seems to have been done on purpose that the bills might not bind all four, but that the money might be raised on the individual credit of the individual firms by the one drawing on the other. That seems to me to be the fair construction of the agreement, and there is no evidence to shew to my mind that the course of business was not carried on precisely in accordance with it. If money were wanted

to pay off bills which the company wanted to take up, the money was raised by one of the partners pledging his individual credit, and drawing on another partner who pledged his individual credit by accepting, and the money raised by the discount of the bills was applied to take up other bills and pay any debts of the company, or it was used in any other way for the purposes of the company.

Therefore I am of opinion, upon the facts, that the intention was by signing the name of each individual firm to bind that firm only.

I do not think there is any difference with respect to the two bills accepted by *Fox Brothers*, even assuming, without deciding, that the putting the name of *Fox Brothers* on a bill might, if it was intended to bind the firm, bind the firm, yet I am of opinion, as a matter of fact, that it was not intended by the name of "*Fox Brothers*" being used to bind the association. This being an entirely secret association there was no holding out to the world, and *Fox Brothers* was a firm carrying on business in its own name for the purpose of *Fox Brothers*, and, therefore, unless the acceptance was given with the authority of the association, and on account of the association, the name of "*Fox Brothers*" on the acceptance would not bind the association; and I am of opinion that these bills accepted by *Fox Brothers* being acceptances for the purpose of raising money for the association, the inevitable inference is, that they were acceptances in accordance with the third article which bound *Fox Brothers* just as much as the other three that money should be raised for the purpose of the association by pledging the individual credit of each of the firms by each of the firms giving their credit, and *Fox Brothers* were bound as much to give their credit as the others. My opinion is, that in respect of these bills *Fox Brothers* were giving the individual acceptance of their firm for the purpose of raising money for the benefit of the association in accordance with the articles.

Perhaps it is right shortly to say something about the authorities. The Vice-Chancellor relied very strongly on the case of *Edmunds* v. *Bushell* (1). Now that case was not very greatly considered, because it was a case where a rule was moved for for

(1) Law Rep. 1 Q. B. 97.

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misdirection, and the rule was summarily refused. When the facts are looked at, there is, as far as I can see, no great doubt about it. The case was tried before Mr. Justice *Crompton*, and the following facts were proved: "The Defendant *Jones* was a wholesale straw-hat manufacturer, who carried on business at *Luton*, in *Bedfordshire*, and also until May, 1865, had a branch establishment in *Milk Street, London*." Therefore that branch was entirely his branch. "The business in *London* was carried on under the name of *Bushell & Co.* By an agreement between the two Defendants," that is, *Bushell* and *Jones*, "it was agreed that *Bushell* should enter *Jones's* service as manager of the establishment in *London*, and that he should be paid for his services quarterly an amount equal to one-half of the net profit to be derived from the business carried on in *London*. *Jones* opened an account in the name of "*Bushell & Co.*" at the *London and County Bank*, into which account *Bushell* was to pay all sums which he received to the amount of £5. He had authority from *Jones* to draw cheques in the name of *Bushell & Co.* for the purposes of the business, but he had no authority to draw or accept bills." It is quite plain upon those facts that *Jones* authorized *Bushell* to carry on business in *London* in the name of "*Bushell & Co.*," and the business so carried on in the name of "*Bushell & Co.*" was *Jones's* business. It is quite plain that if the account at the *London and County Bank* in the name of "*Bushell & Co.*" had been overdrawn by cheques drawn by *Bushell* in the name of "*Bushell & Co.*," *Jones* would have been liable. It was argued that because *Jones* had not given authority to *Bushell* to accept or draw bills in the name of "*Bushell & Co.*," that therefore he was not liable upon the bills; but the Court said, it being part of the ordinary course of such a business to draw and accept bills, you cannot, by giving instructions that bills should not be drawn, prevent yourself from being liable on bills drawn by the person carrying on the business in the name in which you authorize him to carry on your business. In my opinion that case is no authority at all on the case before us.

But the two cases which really are an authority upon the question before us are the cases of *South Carolina Bank* v. *Case* (1)

(1) 8 B. & C. 427.

and *Nicholson* v. *Ricketts* (1). The case of *South Carolina Bank* v. *Case* (2), no doubt, has been very considerably doubted by some Judges. The judgment is very short, but if the arguments of the counsel, Mr. *Parke* and Mr. *Patteson*, are read, it is quite plain what the real question in dispute was. By the articles of partnership, and by the instructions given to the partner who went to *America*, he had no authority to use his own name but the name of the partnership, but, as a matter of fact, for several years the business had been entirely carried on in the name of the individual partner who was in *America*, and the Court of Queen's Bench gave an opinion to the Court of Chancery that under all the circumstances of that particular case the firm in *England* was bound by the bills drawn in the individual name of the partner in *America*, on the ground that that was to be treated, notwithstanding the terms of the partnership articles, as the name of the firm.

In the other case of *Nicholson* v. *Ricketts*, Mr. Justice *Crompton* says about that case (3): "My only difficulty arose from the decision in *South Carolina Bank* v. *Case*. But I think if that case is to be regarded as law it must be on the grounds pointed out by *Bayley*, B., in *Smith* v. *Craven* (4). Rightly or wrongly, the Court there assumed that the facts shewed an authority from the partners in *England* to the partner in *America* to bind the whole firm by contracts made by him there in his own name; that he was, in fact, a mere branch house, abroad, of the house in this country." From the mode in which Mr. Justice *Crompton* states that, it is tolerably clear that he did not himself agree with the inference which the Court drew from all the facts in the *South Carolina Bank* case. He seems to have thought that it ought to have been determined upon what was the real agreement made by the partners *inter se*. However that may be, I am of opinion that this case of *Nicholson* v. *Ricketts* is a direct authority upon the question that is now before us. In that case there was a complete agreement for a partnership between the firm which was in *South America* and the firm in *England*. The partnership was to be a partnership in exchange business, the profit and loss of which

(1) 2 E. & E. 497. (3) 2 E. & E. 527.
(2) 8 B. & C. 427. (4) 1 C. & J. 500.

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was to be divided, and the business was to be carried on by the firm in *South America* drawing bills in its own name upon the firm in *England* and selling those bills in *South America*, and then employing the proceeds by lending money to persons in *South America* for the joint benefit of the two firms, and subsequently by buying short bills to take up the bills in *England*. Therefore the bills were drawn by the firm which was in partnership with another firm, and there was far stronger evidence than there is in the present case that they were drawn for the direct purpose of carrying on the business of the partnership, but nevertheless, because the agreement was that the bills were not to be drawn on behalf of the whole association composed of the two firms, and because the agreement between the two firms was that the bills were to be drawn by one firm on the other, although they were to be drawn and sold for the joint benefit of the two firms, the Court said there is no authority for the firm in *America* drawing bills in its own name to bind the firm in *England* by those bills, that is to say, to treat the name of the firm in *America* as including the name of the firm in *England*. In fact, their very intention was to avoid that by having the bills expressly drawn in the names which were understood to be only the names of the individual firms.

In my opinion that is the case here. The bills were drawn for the purpose of raising funds for the benefit of the firms, but the intention of the four firms was that there were to be bills drawn by each of the firms individually pledging their individual credit, and under such circumstances, in my opinion, the names upon the bills do not represent the *Adansonia Fibre Company*, but they only represent the individual firms whose names are attached to them.

Solicitors: Messrs. *Druce, Sons, & Jackson;* Messrs. *Payne & Layton.*

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[1868 D. 45.]

Wills Act (1 *Vict. c.* 26), *s.* 29—"*Die without Issue*"—*Indefinite failure of Issue—Executory Bequest—Will explained by Codicil.*

A testator, in 1846, gave his residuary real and personal estate to *J. S. L.* and the heirs male of his body lawfully begotten for ever; but in case of his death without heirs male of his body lawfully begot, then the property to go to *P. C. L.* in the same manner; and if *P. C. L.* should die without heirs male of his body lawfully begot, then the property to go to *J. S. A.* in the same manner. By a codicil the testator, after reciting that by his will he had directed that in the event of the death of *J. S. L.* "without leaving male issue him surviving" the residue of the testator's real and personal estates should go to *P. C. L.*, revoked that bequest, and in the event of the death of *J. S. L.* "without leaving male issue him surviving," gave the residuary estate to the eldest daughter (if any) of *J. S. L.*:—

Held (affirming the decision of *Bacon*, V.C.), that sect. 29 of the *Wills Act* (1 Vict. c. 26) did not apply, and that the gifts over to *P. C. L.* and *J. S. A.* were void as to the personalty, as being on an indefinite failure of heirs male, and that the codicil did not alter their effect, and that under the will and codicil *J. S. L.* took an absolute interest in the personalty, subject only to an executory gift over in favour of his eldest daughter if he died leaving no male issue surviving him.

JOHN SMALL, by will dated the 18th of June, 1846, gave his residuary real and personal estate to *John Small Lowther*, and proceeded as follows:—"And it is my express order and will that no part of the real property be ever sold, mortgaged, or alienated by the said *John Small Lowther*, but that it shall descend free and clear of all incumbrances to the heirs male of his body lawfully begotten for ever, and likewise direct that the whole of the personal property that falls to his share by this my will shall be invested either in land or government securities, and that it shall never be called in or the land sold, but the rents and profits to go to the use of the said *John Small Lowther* and the heirs male of his body lawfully begot for ever. But in case of the death of the said *John Small Lowther* without heirs male of his body lawfully begot, then this legacy to go to his brother, *Philip Court Lowther*, with the same conditions and restrictions as stated in the

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case of his brother *John Small Lowther*, and in case the said *Philip Court Lowther* should die without heirs male of his body lawfully begot, then this legacy to go to *John Small Andrew*, with the same restrictions and conditions as stated in the case of *John Small Lowther*."

The testator made two codicils, in the second of which, dated the 8th of August, 1866, the following passage occurred:—"In my said will or codicil I directed that in the event of the death of *John Small Lowther* without leaving male issue him surviving, the residue of my real and personal estate should go to and be vested in his brother, *Philip Court Lowther*. Now I do hereby revoke this bequest, and in the event of the death of the said *John Small Lowther* without leaving male issue him surviving, I give and bequeath the rest, residue, and remainder of my real and personal estate, after the payment of my just debts, funeral, and testamentary expenses, and the legacies given by my said will and codicils, which have not been revoked, to the eldest daughter (if any) of the said *John Small Lowther* and her heirs and assigns."

By the order of Vice-Chancellor *Bacon*, made on further consideration, it was declared that *John Small Lowther* took an estate tail in the real estate, subject to the interest, if any, of any daughter of his, and an absolute interest in the personalty, and the residuary personalty was ordered to be paid over to him. *John Small Andrew* appealed.

Mr. *Chitty*, Q.C., and Mr. *Caldecott*, for the appellant:—

We say that taking the will alone the gift over is, under s. 29 of the *Wills Act* (1 Vict. c. 26), a gift over on the death of *John Small Lowther* without leaving heirs male living at the time of his death, which is not too remote. Even if this would not be so on the will itself, the testator by his codicil puts his own interpretation on his words. There is then as to the personalty a gift over which is not void for remoteness. The gift over to *Philip Court Lowther* being revoked, that to *John Small Andrew* is accelerated: *Lainson* v. *Lainson* (1); *Craven* v. *Brady* (2); *Hutton* v.

(1) 5 D. M. & G. 754. (2) Law Rep. 4 Ch. 296.

Simpson (1); *Fuller* v. *Fuller* (2); *Hodgson* v. *Ambrose* (3); *Avelyn* v. *Ward* (4); *Crozier* v. *Crozier* (5).

Mr. *Eddis*, Q.C., and Mr. *Torriano*, for *John Small Lowther*.

Mr. *Swanston*, Q.C., and Mr. *Cutler*, for the Plaintiffs.

Mr. *Chitty*, in reply.

SIR W. M. JAMES, L.J.:—

I am of opinion that the order of the Vice-Chancellor proceeds on a correct principle, though it requires to be slightly varied. As regards the real estate there is a gift in tail male, as clear a gift of an estate tail as can be made. Then as to the personal estate, the testator directs that it shall be invested in land or government securities, and that the rents and profits shall go to the use of *John Small Lowther* and the heirs male of his body for ever. This is as clear an expression as can be of an intention to create an estate tail; the testator shews that he intended the personalty as well as the realty to go into succession from heir male to heir male, and that heirs male should for ever succeed to the property, and that on failure of heirs male of *John Small Lowther* it should go to *Philip Court Lowther* on the same conditions. This, so far as relates to the realty, is a good limitation of an estate in tail male to *Philip Court Lowther* after the determination of the previous estate tail, but as regards the personalty it is too remote, being a gift over on an indefinite failure of issue. Mr. *Chitty* argued that sect. 29 of the *Wills Act* applied, and that the gift over was in the event of *John Small Lowther* dying without leaving heirs male living at his death; but I am of opinion that the Act has no reference to such a case. The Legislature there deals with "die without issue," "die without leaving issue," and similar ambiguous expressions; but here there is no ambiguity, the gift over is on failure of heirs male of the body. *Philip Court Lowther* therefore takes no interest in the

(1) 2 Vern. 722.
(2) Cro. Eliz. 422.
(3) 1 Doug. 337.
(4) 1 Ves. Sen. 420.
(5) 3 D. & War. 373.

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personalty and *John Small Andrew* cannot take any. Then the codicil causes a difficulty. It has been urged that the recital in the codicil is an interpretation by the testator of the words of his will, and that we must read it as referring to a failure of heirs male of the body at the death. But supposing that the recital in the codicil is anything more than a mere erroneous reference to the limitation in the will, it only refers to the limitation to *Philip Court Lowther* and we cannot carry it on so as to alter the whole of the limitations in the will. Then the words of the gift over in the codicil are as plain as the words of the will itself. There is a clear gift over to *John Small Lowther's* eldest daughter in a particular event. The declaration that *John Small Lowther* took an absolute interest in the personalty must therefore be varied, by adding that it is subject to an executory bequest over to his eldest daughter if he dies without leaving issue male him surviving, and of course the personal estate cannot at once be paid to him.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors: Mr. *William Pitman;* Messrs. *Shum, Crossman, & Crossman.*

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FOXON *v.* GASCOIGNE.

[1872 F. 113.]

23 & 24 *Vict.* c. 127, s. 28—*Solicitor's Lien—Charge on Property recovered or preserved.*

8 PD 211

A bill was filed alleging that the Defendant had built so as to obstruct the Plaintiff's ancient lights, and was proceeding to build so as further to obstruct them, and asking for an injunction against further building, and a mandatory injunction to pull down part of what had been built. An interlocutory injunction was granted against building higher, and the suit was afterwards compromised on the terms that the building should remain of its then height. The Defendant having become bankrupt, his solicitor petitioned to have his costs made a charge on the Defendant's property to which the suit related:—

Held (affirming the decision of the Master of the Rolls), that no property

had been recovered or preserved within the meaning of 23 & 24 Vict. c. 127, s. 28.

A suit which only relates to an easement is not a suit in which it can be said that property is recovered or preserved, even though a mandatory injunction for pulling down buildings is refused.

THIS was an appeal from an order of the Master of the Rolls dismissing a petition by *William Edward Tattershall*, the solicitor of the Defendant, *Edmund James Gascoigne*, which prayed for a declaration that as such solicitor he was entitled (subject to a mortgage to the trustees of the *Victoria Permanent Benefit Building Society*) to a charge on certain leasehold property in *Sheffield* for the amount of his taxed costs, charges, and expenses incident to the defence of the suit; and for the usual consequential relief.

At the time of the institution of the suit the Defendant was entitled to two houses (being the property in question), situate in *Sheffield*, for a term of 800 years, and had demised them by way of mortgage to the *Benefit Building Society* for the same term less the last day. The Plaintiffs were the owners of certain other leaseholds adjoining the Defendant's property on the side and in the rear, there being at the rear of the Defendant's property an open court, three sides of which were bounded by his buildings, and the fourth by those of the Plaintiffs.

In November, 1872, the Plaintiffs filed their bill against *Gascoigne*, containing allegations to the effect that he had begun to make alterations in his premises, and to raise the walls thereof, and in particular had raised walls which were formerly of the height of 25 ft. 6 in. and 30 ft. respectively to the height of 48 ft., and intended to carry them still higher, and that by so doing had already seriously injured, and would further injure, the Plaintiffs' ancient lights; and praying for injunctions to restrain the Defendant from carrying his buildings any higher, and from permitting the walls and building already erected by him to continue so as to diminish the supply of light and air formerly enjoyed by the Plaintiffs through their ancient windows.

Notice was given of a motion according to the terms of the prayer. The motion came on to be heard on the 19th of December, 1872, and was ordered to stand to the hearing upon the

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Defendant undertaking not to carry his wall higher than it then was and not to erect a roof thereon at a greater angle than 45°, and to pull down any part of his buildings if so ordered at the hearing.

On the 4th of February, 1873, *Gascoigne* instituted proceedings for the liquidation of his affairs by arrangement under the 125th section of the *Bankruptcy Act*, 1869; and on the 26th of February *John Walker* was duly appointed trustee in the liquidation; and he was afterwards made a Defendant by a supplemental order.

The Petitioner alleged that *Walker* had retained him as his solicitor for the defence of the suit; but in fact *Walker* appeared by a different solicitor, and the Court held that the alleged retainer was not proved by the evidence.

In or about November, 1873, *Walker* compromised the suit upon terms under which (according to the allegations in the Petition) so much and such part of the relief prayed in the suit as sought to restrain the Defendants from permitting the walls and buildings to continue to remain erected so as to injure the Plaintiffs' ancient lights was not insisted on.

Previously to the compromise, *John Walker* had contracted to sell the property to *William Cooper;* and subsequently to the compromise assigned it to him. *Cooper* had full notice of the suit before the compromise. *Cooper* afterwards made two mortgages of the property, one to *Samuel Walker*, and the other to Messrs. *Bass*, the brewers; and the Petition alleged that these mortgagees had notice, through their respective solicitors, of the suit, and of the fact that the Petitioner's costs had not been paid; and they, as well as *John Walker* and *William Cooper*, were made Respondents to the Petition.

As regards Messrs. *Bass*, the charge of notice was based on two grounds: First, that Messrs. *Bass & Jennings*, who acted as their solicitors, had on the occasion of the mortgage employed Messrs. *Webster & Co.*, of *Sheffield*, the solicitors of *William Cooper*, the mortgagor, to search the county register; and, secondly, that the title-deeds relating to the property were in the custody of the Petitioner, as the solicitor of the *Victoria Permanent Benefit Building Society*, the first mortgagees.

The Master of the Rolls having dismissed the Petition (1), the solicitor appealed, serving only *Samuel Walker* and *William Cooper*.

(1) 1874. May 27. WM 18/4/74

SIR G. JESSEL, M.R. :—

I must say, with the greatest possible respect, that I have not derived much light from any of the decisions except that in *Pinkerton* v. *Easton* (Law Rep. 16 Eq. 490), which is not only the last decision in point of date, but is a decision of the Lord Chancellor's, and therefore if there were any doubt on my mind arising from the prior decisions, I should be bound to follow the authority of that case. Now, as I understand Lord *Selborne*, he says the question under this statute is, whether there has been an actual recovery or preservation of property by means of the suit. There must be two things—there must be an actual recovery or preservation of the property, and it must take place through the instrumentality of the solicitor, and then the Court can make an order for the costs out of the property. Now, what does that expression "actual recovery or preservation" mean? Generally, I apprehend, it means that where the Plaintiff claims property, and establishes a right to the ownership of the property in some shape or other, there the property has been recovered; that where a Defendant's right to the ownership of property is disputed, and that right has been vindicated by the proceedings, there the property has been preserved. There is another case in which property may be preserved at the instance of a Plaintiff, that is, where it is not properly taken care of but liable to destruction or attack by third persons. Then I can understand that a process which may not be called recovery may be preservation. But all the cases, as I understand them, shew, in accordance with what seems to me to be the good sense of the thing, and the plain meaning of the Act of Parliament, that recovery and preservation are correlative terms, and that they both relate to the ownership of the property.

If that is right, how does the present applicant make out that he has recovered or preserved anything. He does not say that he has recovered the property, but he says he has preserved it. Now what occurred was this: a proprietor of a neighbouring house, this being a house in course of building, alleged that the owner of this house, a man of the name of *Gascoigne*, was proceeding to build his walls too high, and that by such building he would interfere with the ancient lights of the Plaintiff's house. A motion was made for an injunction, and the motion, as is very common, not being settled by counsel, was a copy of the prayer of the bill; and the prayer of the bill was not only extended to the injunction which could be got on interlocutory application to prevent the Defendant going on further with his buildings, but it went on to ask the Court to order him to pull down so much of the building or wall as had been erected before the suit, and which tended, or was alleged to tend, to the obstruction of the Plaintiff's lights. The solicitor appeared on that motion for an injunction; all that was done was to restrain the Defendant from proceeding any further, which, of course, was not recovering or preserving anything; no order was made for pulling down anything, and there was liberty given to the Defendant to put on a roof, he

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Mr. *Ince*, and Mr. *Whitaker*, for the Appellant:—

The Petitioner claims a lien under 23 & 24 Vict. c. 127, s. 28. The bill sought a mandatory injunction, and the suit has preserved

undertaking to take it down again if the Court so ordered at the hearing. That is the substance of what occurred.

After that the Defendant became bankrupt, or substantially bankrupt, and a Mr. *John Walker* became his trustee. [His Honour considered the evidence on the question whether the trustee had retained Mr. *Tattershall*, and held the retainer not proved.]

The next step in the proceedings which I need notice is this, that the trustee sold the property to a purchaser, who had notice through his solicitor, of the pendency of the suit. The purchaser mortgaged the property to a mortgagee, who is also alleged to have had notice through his solicitor, and then he mortgaged to Messrs. *Bass & Co.*, who are also alleged, on grounds which I will presently consider, to have had notice. Before the completion of the sale the suit was compromised on terms the effect of which is stated to have been that the buildings on this property were allowed to remain in *statu quo*. Then this Petition is presented, asking for a statutory charge, and asking also to establish that charge against all these people, none of whom ever employed Mr. *Tattershall*.

Now, as regards Messrs. *Bass & Co.*, they are not to be liable if they had no notice, and I am clearly of opinion that they are not proved to have had it. What is alleged against them is this, that their solicitors, Messrs. *Bass & Jennings*, employed a Mr. *Webster*, the solicitor of the mortgagor, to search the register for incumbrances, and give a certain notice. That did not make Mr. *Webster* the solicitor of *Bass & Co.* They had their own solicitors, Messrs. *Bass & Jennings*, who had conducted the whole transaction, but they did, on the completion of the transaction, request these people to do for them, as their clerks, this ministerial act. I think I should be doing violence to both the theory of the cases and to the literal words of them if I were to hold that that was an employment which made the solicitors of the mortgagor the solicitors of the mortgagee, and affected the mortgagee with notice.

The other ground on which Messrs. *Bass & Co.* were alleged to have notice is a very curious one. It seems that there was a first mortgage on this property, made by *Gascoigne* to a building society before the suit, which mortgage still remains unpaid, and that the title-deeds were, of course, in the possession of the building society. The solicitor to the building society is the same Mr. *Tattershall*, and it appears that Messrs. *Bass & Jennings* were aware of this; they were aware, as they bought subject to the first mortgage, that there was a first mortgage, and that the deeds were in the possession of the first mortgagee. It is said that, being so aware, they were bound to look at the deeds, and took the consequences of not looking at them if anything appeared upon them. Then it is said that if they had gone to look at the deeds they would have been told by the secretary or some officer of the building society that the deeds were not in the actual possession of the building society, but were in the possession of their solicitor, Mr. *Tattershall*, and if they had gone to his office and seen him, Mr. *Tattershall* would certainly have told them of the

the property from being pulled down. It is not necessary that the whole property should be preserved. The keeping it in *statu quo* is enough; and it is not necessary that the solicitor should have done anything actively: *Jones* v. *Frost* (1); *Pinkerton* v. *Easton* (2); *Twynam* v. *Porter* (3); *Bailey* v. *Birchall* (4); *Baile*

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claim he now makes. All I can say is, that that, in my opinion, is something like a possibility upon a possibility. First of all, it does not at all follow that he would have been told that the deeds were in the hands of the solicitor, the secretary might have been good enough to have got the deeds to shew him; and secondly, Mr. *Tattershall* might have been out, and one of his clerks might have shewn the deeds and said nothing about it. Notice of Mr. *Tattershall's* claim had no immediate relation to, and no direct or necessary connection with, the seeing the deeds. It appears to me it would be extravagant to carry the doctrine of constructive notice so far as that. Therefore, as regards Messrs. *Bass & Co.*, I hold they had no notice, and are relieved from all claim upon that point.

Then as to the purchasers and the other mortgagees, who are alleged to have notice, it appears to me that there is no evidence that any part of the property, that is to say, *quâ* property, or the ownership of it, was preserved for them. First, I am not at all satisfied, as a matter of fact, that the Defendant was injuring the light of the Plaintiffs. Even if he was, what really got rid of the claim was a compromise, the terms of which I know nothing about, but that compromise was not carried out or effected by Mr. *Tattershall*, but by a subsequent solicitor in the matter. That seems to me not to be preserving the ownership of the property, but, if such an expression may be used, preserving the property from this claim. What took place upon the motion for an injunction did but keep the property in *statu quo*, because the injunction was simply to prevent anything from being done, and the permission to erect a roof was not a preservation of the property in the sense required for the present purpose, though it was urged in the argument, in reply, that putting on a roof would prevent the rain from coming in and damaging the property. I do not think that preservation in the sense of protecting property from physical damage is within the meaning of the statute. But even if it were, the only charge I can make is upon what is preserved. When Dr. *Lushington*, in the case of *The Philippine* (Law Rep. 1 A. & E. 309), points out by his order that he must limit the charge to so much of the money preserved as had got into the property, there he could do it because it was a sum of money. But how can I do it in a case of hypothetical or possible damage? I cannot inquire to what extent the property would have been damaged, and give an order for an amount not exceeding such an amount as, upon inquiry, I should find to be the possible or probable damage. It does not appear to me that this is the fair meaning of the Act, or that the Act was intended to extend to such a hypothetical case of protection. Therefore I hold that the Petitioner has wholly failed.

(1) Law Rep. 7 Ch. 773.
(2) Ibid. 16 Eq. 490.
(3) Ibid. 11 Eq. 181.
(4) 2 H. & M. 371.

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v. *Baile* (1); *Scholefield* v. *Lockwood* (2); *Smith* v. *Winter*, before Vice-Chancellor *James*, Jan. 31, 1870; *The Philippine* (3).

Mr. *North*, for the Respondents, was not called upon.

SIR G. MELLISH, L.J.:—

This is an appeal from an order of the Master of the Rolls dismissing a petition by a solicitor, which asked that the charges of the solicitor against the Defendant in the suit might be made a charge on the property, which was a house alleged to have been preserved by the suit.

The question turns upon the construction of the 28th section of the 23 & 24 Vict. c. 127, which says, "In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any Court of Justice, it shall be lawful for the Court or Judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved."

Now there have been a great many cases on this section, but in all, as far as I have been able to discover, in which the charge has been allowed, the suit or action has related to property, that is to say, it has been a suit for the recovery of property or for the administration of property, or otherwise dealing with the ownership of property. No doubt it applies to property of all kinds: personal property and real property, corporeal and incorporeal property, property in possession and property in remainder or reversion. Wherever any property has been recovered or preserved, there the Act may be said to apply.

A large number of the cases have been suits for the administration of property, and of course in suits for the administration of property, as in suits for the administration of the property of a testator, the Court decides and settles to whom each portion of that property belongs. In such a suit property may be either recovered or preserved, although, according to the last case before

(1) Law Rep. 13 Eq. 497. (2) Law Rep. 7 Eq. 83.
(3) Law Rep. 1 A. & E. 309.

Lord *Selborne*, it does not necessarily follow in an administration suit that property is recovered or preserved, and if it is neither recovered nor preserved, then the Act does not apply.

Now the case before us was a suit respecting ancient lights. It was a suit alleging that the Plaintiffs were entitled to light to certain windows, that the Defendant was raising his neighbouring building, that he had already obstructed the Plaintiffs' light, and was proceeding to build still higher, which would still further obstruct the Plaintiffs' light, and the Plaintiffs asked for an injunction to restrain the building being erected higher by the Defendant, and also for a mandatory injunction that some portion of the building already erected should be pulled down. Subsequently the Defendant became bankrupt, and the suit was ultimately settled between the trustee in bankruptcy and the Plaintiffs, on the terms that the building should not be raised any higher, but that the Defendant or his trustee should not be obliged to take down what had been actually erected. We have now to determine whether this is a suit in which property can properly be said to have been recovered or preserved.

The Master of the Rolls stated several grounds for his judgment, but one of the grounds, and the ground upon which our judgment will be based, was, that this was not a suit in which property was recovered or preserved, and in my opinion that is correct.

The suit was one relating solely to an easement. Now, first, let us suppose that the Plaintiffs entirely succeed in such a suit, that they sustain their right to the lights, and obtain an injunction preventing the Defendant from obstructing them, could the Plaintiffs' solicitor say that any property was recovered, so as to entitle him to a charge upon it? Would it be possible to say that the house was recovered, or that the house was preserved? It seems to me that it would be impossible to say so. The title of the Plaintiffs to the property in their house is not in question at all. All that can by any possibility be said to be recovered or preserved, whichever word you choose to employ, is the right to the lights. How is it possible to make a charge upon a right to the lights? A charge can only be made upon the property itself which is recovered or preserved, and it cannot be made if the suit relates only to some incident to the property. You cannot, as it

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appears to me, because some benefit has been acquired to the property, on that account make a charge upon the whole property. It seems to me impossible to make a charge upon an easement. Supposing there is a suit respecting a right of way, whether the Plaintiff has or has not a right of way in a certain direction over the Defendant's close, however that suit may end, whether the Plaintiff succeeds in establishing his right of way, or whether the Defendant succeeds in establishing that there is no right of way, how can it be possibly said that any property was either recovered or preserved by the result of that suit? If the Plaintiff succeeds, his property may be benefited by having a right of way attached to it, and if the Defendant succeeds, the Defendant's property may be benefited by its being established that it is not subject to any such right of way over it. Still it appears to me that it cannot be properly said that the property is either recovered or preserved, because, in my opinion, "preserved" is used in contradistinction to "recovered," and "preserved" means preserved from the claim of property which is made by the other side. I doubt extremely whether, in any case where, if the Plaintiff succeeds, it cannot be said that he has recovered any property, it can properly be said, if the Defendant succeeds, that any property has been preserved. Take the ordinary case of a suit about lights; as respects the Defendant, there the real question is not whether the Defendant is the owner of his property, that is not in dispute at all; the only question is whether he is entitled to use his property in a particular way, or whether his using it in a particular way will prejudice the rights of the Plaintiff. Supposing the Defendant succeeds, and he establishes that he has a right to use his property in the way in which he maintains that he has, I cannot see how by that any property is either recovered or preserved; and indeed the only ground upon which it was at all plausibly put that any property was recovered or preserved in this case was, that it so happens that a mandatory injunction was asked for to take down some portion of the building which had been raised, and then it was said, "Well, that portion of the building is preserved." In my opinion it is not preserved within the true meaning of the Act, because the property is not affected. If a mandatory injunction had been granted the

property in the whole house, including the erection, would have remained in the Defendant as much after the suit as it did before; but he would have been obliged to use it in a particular way, and to diminish the height of it. When he has done that, the property in the bricks, mortar, beams, and iron which raised it will remain in him. No property is taken from him, and it appears to me that we should be drawing a very narrow distinction indeed if we came to the conclusion that in suits respecting lights, if the Plaintiff files his bill before any obstruction has been actually erected, and the result of the suit is that the Defendant maintains his right to erect the proposed building, and succeeds altogether, and then proceeds to erect it, that there no property is preserved, but that if the Plaintiff asks for a mandatory injunction, which in practice is very seldom granted, and the suit of the Defendant is so far successful that a mandatory injunction is not obtained, then the property is preserved. In my opinion, according to the true construction of the Act, in order that the Act may apply, the suit must relate to the property itself, which property itself must be either held to be the property of the Plaintiff, or be held to be the property of the Defendant, and the Act cannot be made to apply to suits which do not relate either to the recovery of property or the administration of property, but only to rights in the nature of easements which the owner or occupier of one property may have against the owner or occupier of another.

It is said that this Act ought to be liberally construed, and although for some purposes that may be so, yet I have very considerable doubt whether great harm would not be done if it were extended to suits of this kind. Suits relating to easements sometimes involve very important questions, and are of considerable importance to the person who is the owner of the property; but they very often relate to extremely trifling questions, and I doubt whether it would be for the public good that in every case where there is a dispute relating to an easement, the value of which may be extremely trifling, the solicitors should be encouraged to go on by knowing that if their client is successful their costs, however long the litigation may be carried on, will be a charge on his property which is benefited. I think that to lay down such a rule would be to stretch the words of the Act

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beyond their natural meaning, and in a manner not within the principle upon which the Legislature acted, in enacting that the costs of the solicitor shall be a charge upon the property recovered or preserved.

SIR W. M. JAMES, L.J.:—

I am of the same opinion.

The appeal will be dismissed with costs.

Solicitors: Mr. *E. B. Tattershall;* Messrs. *Doyle & Edwards.*

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In re RUBY CONSOLIDATED MINING COMPANY.

ASKEW'S CASE.

Rectifying Register—Removing Name of Shareholder—Fraud—Action at Law—Discretion under Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 35.

20 Eq 118
10 L.D. 184

Where a holder of fully paid-up shares applied to have his name removed from the list of shareholders, alleging that he was induced to take shares by fraud, and the facts alleged by him were denied by the company, the Court refused to make any order under the 35th section of the *Companies Act,* 1862, until the applicant had tried the question at law in an action to recover what he had paid on the shares.

Order of *Malins,* V.C., discharged.

THIS was a motion under the 35th section of the *Companies Act,* 1862 (25 & 26 Vict. c. 89), to have the name of the applicant, Mr. *Askew,* removed from the list of shareholders of the *Ruby Consolidated Mining Company,* on the ground that he had been induced to become a member of the company by means of misrepresentations in the prospectus.

The prospectus stated that the company was formed to work certain mines in *California,* which had been purchased by the company for £285,000, and that the titles to them had been investigated and found to be perfect.

Mr. *Askew* applied for shares, and was allotted fifty £10 shares, which he paid up in full on the 4th of June, 1872.

The misrepresentations relied on were the non-statement of a

certain arrangement as to paying the shares in cash, and as to providing thereout for the directors' qualification, and the statement as to the titles having been investigated; and also the non-statement of the fact that the same property had a short time previously been sold for £40,000 by one *Hartmont*, a director, to the person from whom the company purchased.

The grounds of defence were delay and that the prior sale by *Hartmont* was not at the time known to any of the other directors; and as to the other matters, the articles of association were relied upon. Several of the allegations of Mr. *Askew* were denied on behalf of the company.

The Vice-Chancellor *Malins* made an order to have the applicant's name excluded from the list of shareholders; and the company appealed.

Mr. *Cotton*, Q.C., and Mr. *Kekewich*, for the company:—

We contend that there was no such fraud as would justify the Court in relieving *Askew*; and, moreover, that he took no steps to be relieved until long after he knew all the facts on which he now relies. The alleged fraud is, at all events, that of one of the directors and not of the company, which was itself deceived. The shares are all fully paid, and *Askew* is under no liability. His only object is to get the opinion of this Court to assist him in an action at law for the recovery of the money he has paid.

Mr. *Glasse*, Q.C., and Mr. *Graham Hastings*, for Mr. *Askew*, cited as authorities for the removal of the name, *Ship's Case* (1), *Ex parte Los* (2), *Oakes* v. *Turquand* (3), and *Ex parte Ward* (4). No doubt the Court has, under sect. 35, a discretion, but that discretion is not arbitrary, and must be exercised under fixed rules; and the rule is, that a shareholder who has been deceived can have his name taken off the list.

SIR W. M. JAMES, L.J.:—

The Vice-Chancellor does not appear to have apprehended that in making this order he was really determining the very matter which would have to be determined in an action by Mr. *Askew*

(1) 2 D. J. & S. 544. (3) Law Rep. 2 H. L. 325.
(2) 34 L. J. (Ch.) 609. (4) Ibid. 3 Ex. 180.

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against the company for money had and received. The moment it has been determined by a Court of competent jurisdiction that a man never was a shareholder, it becomes a mere matter of course that in an action for the money he has paid for his shares he must recover. On the trial of his action Mr. *Askew* would merely produce the order of the Vice-Chancellor, and all those consequences would follow. That being so, I think there would be no advantage, but, on the contrary, a great disadvantage, in now trying this motion on its merits instead of having it tried in the best way—that is to say, before a jury, when all the witnesses will be examined *vivâ voce*. Mr. *Askew*, having paid upon his shares in full, will incur no liability by remaining on the register, and all he wants is to get his money back.

The Vice-Chancellor's order must be discharged, and the motion will stand over, with liberty to Mr. *Askew* to take such proceedings as he may be advised. The costs of this application will be dealt with when the motion is brought on again.

SIR G. MELLISH, L.J.:—

I think it clear, that under sect. 35 of the Act of 1862, the Court has a discretion, if the case cannot properly be tried on a motion like this, to refuse to determine it until an action or suit has been brought. And I think there is good reason for taking that course in the present case, because Mr. *Askew's* shares being fully paid up, he does not run the risk which an ordinary shareholder would run by remaining on the register. An ordinary shareholder would be entitled to be released at once from the risk of loss and of liability by calls in case a winding-up order should be made while his name remained on the register. Here, the only question is, whether Mr. *Askew* is entitled to recover back the money which he has paid. That question will be more properly tried in an action at law, for it involves very serious charges of fraud against gentlemen of respectability who were directors of the company. It would be more just to them that the question should be determined in the ordinary way.

Solicitors: Messrs. *Harper, Broad, & Battcock*; Messrs. *Markby, Tarry, & Stewart.*

Ex parte KEIGHLEY. *In re* WIKE.

L. JJ.
1874
June 5, 12, 26.

Bankruptcy—Practice—Rehearing—Extent of Jurisdiction—Pendency of Appeal—Additional Evidence on Appeal—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 71.

On an application to direct a rehearing of a case by the County Court Judge, it was held by the Chief Judge in Bankruptcy that the jurisdiction to rehear given by sect. 71 of the *Bankruptcy Act*, 1869, in a proper case was almost without limit; and that the fact that an appeal from the original order was pending did not prevent the Court from rehearing the case. But the Chief Judge held that under the circumstances the County Court Judge was right in refusing the rehearing. He also affirmed the original order.

On appeal from both orders, the Lords Justices affirmed the order refusing a rehearing, and heard the other appeal with additional *vivâ voce* evidence.

THIS was an appeal from two orders of the Chief Judge in Bankruptcy.

George Wike and *John Mellin Wike*, who were merchants in partnership at *Manchester* and elsewhere, under the firm of *John Wike & Son*, stopped payment in October, 1872, and they were afterwards adjudicated bankrupts in the *Manchester* County Court. A proof for £14,259 was carried in against their joint estate by Mr. *James Keighley*. The proof was founded upon some guarantees given in the name of the firm. The trustee in the bankruptcy rejected the proof on the ground that the guarantees, though given in the name of the firm, did not bind them, because they were signed by *J. M. Wike* without the authority of his partner. The matter was referred to the Judge, and an issue was tried by him without a jury on the 18th of July, 1873, and he affirmed the decision of the trustee, and rejected the proof. Some additional evidence was subsequently discovered, and on the 7th of January, 1874, an application was made to the County Court Judge for a rehearing.

At this time an appeal to the Chief Judge from the original decision was pending, and the County Court Judge thought that, under these circumstances, he had no jurisdiction to entertain the application for a rehearing. The Chief Judge, however, expressed his opinion that the pendency of the appeal did not affect the

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Ex parte KEIGHLEY.
In re WIKE.

jurisdiction of the County Court Judge as to the rehearing, and the case was referred back to him, and the hearing of the appeal was ordered to stand over. The application for a rehearing was then renewed in the County Court on the 3rd of March, and was refused by the Judge. Mr. *Keighley* appealed to the Chief Judge in Bankruptcy, who held that the County Court Judge had full jurisdiction to rehear the case if he had thought it a proper case for rehearing, but considered that his discretion had been soundly exercised in refusing to grant the application under the circumstances of the case, and therefore dismissed the appeal (1).

The Chief Judge also subsequently dismissed the appeal from the original decision of the County Court Judge upon the merits, and *Keighley* appealed from both orders of the Chief Judge.

(1) 1874. April 27. WN(74) 95

SIR JAMES BACON, C.J. :—

The question before me is really a narrow one. Application was made to the learned Judge to rehear a case which he had heard on a former occasion. He was of opinion that the new evidence which was brought before him did not justify his interference with the decision which had been already pronounced, and he therefore declined to have a re-litigation of a matter which he had disposed of.

Having listened to the learned Judge's judgment, I must confess that I should take a much more extensive view of that discretion which the 71st section of the Act gives with regard to rehearings than he seems to have taken; nor do I think there would have been any danger, if he had thought right to do so, in rehearing this case, because it could hardly have been said he was initiating a new kind of proceeding, since the practice of rehearing proper cases on proper materials is of very considerable antiquity. It is a part of the practice in bankruptcy which exists in as much force now that the 71st section is part of the law of bankruptcy as it did before.

[His Honour then referred to the evidence, and added :—]

The only question which I have to consider is whether the learned Judge, having decided as he did on the first occasion, having in his mind what he had then done and the evidence on which he had acted, and being invited now to consider the additional evidence, was right in saying, "That evidence does not change my opinion; the case, notwithstanding that evidence, remains exactly as it was when I considered it in the first instance." Ascribing to the learned Judge, as I have said, a larger discretion than he seems to have thought he had, being of opinion that the discretion is almost without limit in proper cases, and that there ought to be no hesitation in exercising it, I cannot say I think that if I had been in his place I should hav decided otherwise than he did, or that I should not have refused, on such additional evidence as was tendered to him, to rehear a case which had been already disposed of on the evidenc previously brought before him. I am of opinion, therefore, that I must refuse this appeal.

Mr. *De Gex*, Q.C., and Mr. *Ambrose* (Mr. *G. W. Lawrance* with them), for the Appellant:—

Before the Act of 1869 it was almost a matter of course to allow rehearings in the Court of Bankruptcy. Under the 71st section of the Act of 1869 the discretion of the Court is as large as it was before. Our object in asking for a rehearing is to adduce the evidence of an accountant which throws great light on the transaction, and to state our case afresh before the County Court Judge (1). If the Court should be against us on the question of rehearing, we ask to have an opportunity of adducing fresh evidence here.

Mr. *Little*, Q.C., and Mr. *Jordan* (Mr. *Finlay Knight* with them), for the trustee:—

The Court will not grant a rehearing after the expiration of twenty-one days from the original hearing, after the analogy of the rule in the case of appeals, unless a special case be made out: *Ex parte Brown* (2). In the present case no application for a rehearing was made for nearly six months after the original hearing. If the case were reheard, the affidavit of the accountant could not be received, for it is not evidence. He could only form his opinion from the books, which are themselves in evidence. The question of rehearing is a matter of discretion with a Judge, and this Court will be reluctant to interfere with his decision.

SIR W. M. JAMES, L.J.:—

We think that a rehearing before the County Court Judge ought not to be granted. But we cannot satisfactorily dispose of the appeal on the merits without examining the two Messrs. *Wike* in Court. We will, therefore, allow the case to stand over for a fortnight in order that they may attend in Court for that purpose; but the Appellant must pay all the costs of their attendance, and of the additional day of hearing.

(1) The following cases were cited at the hearing before the Chief Judge: *Ex parte Lavender* (2 Mont. & A. 117); *Ex parte Cunningham* (3 Dea. & Ch. 70); *Ex parte Imbert* (1 De G. & J. 152); *Ex parte Jackson* (3 Dea. 651).

(2) Law Rep. 9 Ch. 304.

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June 26. On this day the two Messrs. *Wike* were examined in Court, and the case was argued on the merits by the same counsel.

The LORDS JUSTICES were of opinion, on the result of the evidence, that *J. M. Wike* had authority to sign the guarantees in the name of the firm. They accordingly discharged the order of the County Court Judge, and directed the proof on the guarantees to be admitted. The appeal against the order of the Chief Judge dismissing the application for a rehearing was dismissed with costs.

Solicitors for the Appellant: Messrs. *Mackrell & Co.*

Solicitors for the Trustee: Messrs. *Torr & Co.*, agents for Messrs. *Sale, Shipman, & Co., Manchester.*

L. JJ. 1874 *July* 10.

Ex parte NADEN. *In re* WOOD.

Provable Debt—Debt capable of being fairly estimated—Separation Deed—Annuity — Invalid Marriage — Deceased Wife's Sister — Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 31.

5 Ch D 373.

A man went through the ceremony of marriage with a sister of his deceased wife, and lived with her as his wife. They afterwards separated, and a separation deed in the ordinary form was executed, in which she was described as his wife, and he covenanted with the trustees of the deed to pay her an annuity for their joint lives. There was a proviso that, if the parties should live together again by mutual consent, the deed should become void. The annuity was paid for twelve years, and then the man became bankrupt:—

Held (affirming the decision of *Bacon*, C.J.), that the value of the future payments of the annuity was capable of estimation, and was provable in the bankruptcy.

As the parties never could legally live together as husband and wife, the proviso, making the deed void in the event of their doing so, must be disregarded.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

Previously to October, 1858, *W. R. Wood* was living with a sister of his deceased wife as his wife. He had gone through the form of marriage with her. Differences took place between them, and they agreed to live separately, and a deed was executed in the ordinary

form of a separation deed between husband and wife. This deed was dated the 5th of October, 1858, and was expressed to be made between *W. R. Wood* of the first part, *Mary Wood*, his wife, of the second part, and *John Dennis* and *Noah Naden* of the third part. It contained a recital that differences had arisen between *W. R. Wood* and *Mary Wood*, and that they had agreed thenceforward to live separate and apart; and by it *W. R. Wood* covenanted with *Dennis* and *Naden* that it should be lawful for *Mary Wood* thenceforth to live separate and apart from him, as if she were sole and unmarried, and that he would not at any time thereafter molest, annoy, or in any manner interfere with her, nor by proceedings in the Ecclesiastical Courts or otherwise attempt to compel her to reside with him; and that he would, during the joint lives of himself and *Mary Wood*, pay to her, or to *Dennis* and *Naden* for her use, the yearly sum of £40. And in consideration of the premises *Dennis* and *Naden* jointly and severally covenanted with *W. R. Wood* that *Mary Wood* should not at any time thereafter molest, or annoy, or in any manner interfere with *W. R. Wood*, nor by proceedings in the Ecclesiastical Courts or otherwise attempt to compel him to reside with her; and further, that she should not, after the expiration of one month from the date of the deed, reside within five miles of the then residence of *W. R. Wood*, so long as he should reside there; and further, that she should not take any proceedings against *W. R. Wood* for compelling payment to her of any future or other alimony or maintenance than the above annuity; and further, that *Dennis* and *Naden* would indemnify *Wood* from all debts, contracts and engagements that should or might thereafter be contracted or entered into by *Mary Wood*, and from all actions, suits, claims, and demands whatsoever on account thereof or in relation thereto. Provided always, that if *W. R. Wood* and *Mary Wood* should at any time thereafter by their mutual consent live together again, then the deed and every clause therein contained should thenceforth be and become absolutely null and void.

After this deed was executed the parties lived separate, and the annuity was regularly paid by *Wood* till the year 1870. He married again, and *Mary Wood* married a Mr. *Spencer*, who afterwards died.

On the 26th of June, 1871, *Wood* was adjudged a bankrupt in

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the *Kingston* County Court. The trustees of the separation deed tendered a proof for £16 15*s.* 3*d.* arrears of the annuity due at the commencement of the bankruptcy, and £250 10*s.*, the estimated value (as found by an actuary) of the future payments. The Judge was of opinion that there was good consideration for the deed, but that the value of the future payments was incapable of being fairly estimated. He therefore admitted the proof for the arrears, but rejected the remainder of the claim.

The trustees of the deed appealed from this decision to the Chief Judge in Bankruptcy.

The Chief Judge was of opinion that, as the parties could never legally live together as husband and wife, the proviso making the deed void in the event of their doing so must be disregarded, and that the value of the future payments of the annuity was capable of estimation, and was provable in the bankruptcy. The trustee in bankruptcy appealed from this decision.

Mr. *Robertson Griffiths* (Mr. *Josiah Wilkinson* with him), for the Appellant:—

There was no consideration for the deed, for there was no obligation on the part of the bankrupt to provide for the maintenance of the lady, and none on her part to reside with him. Moreover, the debt is not provable, because it is incapable of being fairly estimated, and, therefore, is not provable under the 31st section of the *Bankruptcy Act*, 1869. It is impossible to say when these parties may return to live together. An annuity subject to a similar contingency was held not to be provable under the former *Bankruptcy Act* in *Mudge* v. *Rowan* (1). *Brett* v. *Jackson* (2) is also in point.

Mr. *H. W. Lord*, for the trustees of the settlement, was not called on.

SIR W. M. JAMES, L.J.:—

I am of opinion that the Chief Judge's decision was quite right. I think that the County Court Judge did not address his mind to the fact that the provision in the separation deed was wholly void.

(1) Law Rep. 3 Ex. 85. (2) Law Rep. 4 C. P. 259.

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It is quite impossible that this man and this woman can ever live together as husband and wife in the present state of the law; and the Court cannot contemplate an alteration in the law. If the condition contemplated their living together not as husband and wife, it was *contra bonos mores*, and for that reason void. The condition being a condition subsequent, the deed must be read as if the proviso in question did not form part of it. So read, it is an ordinary deed of covenant for payment of an annuity to a person for life, and the annuity is clearly capable of being estimated, and may be proved under the 31st section of the *Bankruptcy Act*, 1869. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J., concurred.

Solicitors for the Appellant: Messrs. *Wilkinson & Howlett.*
Solicitor for the Respondents: Mr. *E. M. Hore.*

Ex parte BAUM. *In re* EDWARDS.

L. JJ. 1874 *July* 31.

Bankruptcy—Liquidation—Debt not provable—Declaration containing Counts in Tort as well as Counts in Contract—Bankruptcy Act, 1869, *s.* 31—*Bankruptcy Rules*, 1870, *r.* 260—*Resolution for Composition—Election of Creditor to proceed at Law.*

A creditor brought an action at law against his debtor, in which he joined counts in contract for breach of promise in not accepting certain bills of exchange, with counts in tort for misrepresentations contained in a letter written by the debtor. The debtor afterwards filed a petition for liquidation, and the creditors agreed to a composition:—

Held, that the debtor was entitled to an injunction to restrain the Plaintiff from proceeding at law on the counts in contract, but that the Court had no jurisdiction to restrain him from proceeding on the counts in tort:

Held, also, that the creditor having elected to proceed at law, could not receive a composition in respect of what he might fail to recover in the action.

THIS was an appeal from an order of Mr. Registrar *Murray*, sitting as Chief Judge in Bankruptcy.

J. Edwards and *E. H. Westphal* carried on the business of commission agents in *London*, under the firm of *Edwards & Westphal.*

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In January, 1871, Messrs. *Edwards & Westphal* applied to Messrs. *Baum & Liepmann*, bankers at *Danzig*, to discount bills drawn on them by Mr. *J. G. Ord;* and in reply to their inquiries respecting the respectability of Mr. *Ord*, they wrote to them the following letter:

"*London*, 14th January, 1871.

"We wrote you on the 11th inst., and owe you still an answer to your inquiry respecting Mr. *J. G. Ord.* This gentleman is a highly respectable and honourable man, who was for ten years engaged in our office, and with whom we intend to do business to a considerable extent in the course of the year. You can therefore always take as firmly settled that we shall ever accord the promptest protection to Mr. *Ord's* drafts, as the same would surely not come to you with bills on us for the drawing which he is not authorized. It could thus only be prejudicial to his credit with respect to ourselves if we, in conformity with your wish, were to open a credit with you for Mr. *Ord* for a limited sum, whilst we are firmly convinced that it is to your interest alone in this respect to treat Mr. *Ord* without any limit whatever.

"Yours respectfully,

"*Edwards & Westphal.*"

In reliance on this letter, *Baum & Liepmann* in August, 1873, discounted various bills drawn by *Ord* on *Edwards & Westphal*, but which the latter firm refused to accept, on the ground that *Ord* was not authorized to draw them.

On the 3rd of September, 1873, *Baum & Liepmann* brought an action in the Court of Common Pleas against *Edwards & Westphal* for their loss in discounting these bills. The first count of the declaration was for breach of contract in refusing to accept the bills, and the usual money counts were added. The second and third counts were for damages sustained by the Plaintiffs through the representations contained in the letter of the 14th of January, 1871, which they alleged to be false and fraudulent. The damages were laid at £4000.

On the 24th of December, 1873, the Defendants pleaded the general issue to all these counts.

On the 23rd of April, 1874, the Defendants filed their petition

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for liquidation; and on the 14th of May an extraordinary resolution to accept a composition of 5*s.* in the pound was agreed to by the requisite majority of creditors, and subsequently confirmed.

On the 1st of July, 1874, *Edwards & Westphal* applied to the Registrar for an order restraining *Baum & Liepmann* from proceeding with this action, which order the Registrar granted; and *Baum & Liepmann* appealed from that decision.

Mr. *De Gex*, Q.C., and Mr. *Brough*, for the Appellants:—

The Court has no jurisdiction to make the order appealed from. Rule 260 of the *Bankruptcy Rules*, 1870, which follows the words of the 13th section of the *Bankruptcy Act*, 1869, only empowers the Court to restrain proceedings at law against the debtor in respect of any debt provable; and under the 31st section, no demands in the nature of unliquidated damages, arising otherwise than by reason of a contract or promise, are provable. It is true that some of the counts of the declaration were on contract, but we are willing to strike them out, and proceed only on those which are based on the Defendants' tortious misrepresentation.

Mr. *Winslow*, Q.C., and Mr. *Robson*, for the debtors:—

The demand of the Appellants against us is substantially one arising out of contract. If bills had been accepted, they could have maintained no action on the letter complained of. It would be an evasion of the Act, and contrary to the policy of the bankruptcy laws, if a creditor whose real claim arose out of contract could add a count to his declaration alleging fraud, and so avoid an injunction.

SIR G. MELLISH, L.J.:—

This is an application by liquidating debtors to restrain an action at law against them under Rule 260 of the *Bankruptcy Rules*, 1870, by which the Court may at any time after the presentation of a petition for liquidation restrain further proceedings in any action against the debtor "in respect of any debt provable." The 31st section of the *Bankruptcy Act*, 1869, enacts that "demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be

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provable in bankruptcy." It is therefore clear that damages for false representation are not provable, and that the Court of Bankruptcy has no jurisdiction to restrain an action for fraud or misrepresentation. I agree that if a Plaintiff joins claims which are provable with claims which are not provable, the Court of Bankruptcy is not prevented from restraining the proceedings in respect of the claims which are provable: but, on the other hand, the Court cannot take advantage of the insertion of claims which are provable to restrain the Plaintiff from enforcing claims which are not provable, and which he ought not to be restrained from enforcing.

Now it is clear that some of the counts profess to be counts for damages for misrepresentation; and, assuming that the letter of the 14th of January, 1871, amounts to a false representation, it may be proved that such false representation was to the prejudice of the persons who discounted the bills; and if so, it will be a cause of action for damages which cannot be proved in bankruptcy. It is, of course, material to the person who discounts bills that the drawer should be honourable and respectable, so that if the acceptor fails, he may have a remedy against the drawer. Whether this false representation will be proved or not I cannot say, but this Court has no power to restrain the Plaintiffs from bringing an action on that ground.

The proper course will be to restrain the Plaintiffs from proceeding in any action founded on contract, and from setting up any breach of contract in any action. There will be no costs in the Court below or here.

SIR W. M. JAMES, L.J., concurred.

Mr. *De Gex*, Q.C., asked that the Plaintiffs might be allowed to receive a composition for any balance due to them which they might not recover in the action. Under the 15th section of the *Debtors Act*, 1869 (32 & 33 Vict. c. 62), a creditor may proceed against a fraudulent debtor for the unpaid balance, although he has accepted a composition.

SIR W. M. JAMES, L.J.:—

No; you must elect between proceeding at law or proving under

the composition. The action is not similar to a proceeding under the *Debtors Act.*

L. JJ. 1874 *Ex parte* BAUM. *In re* EDWARDS.

Mr. *De Gex :*—We will elect to proceed at law.

Solicitors: Mr. *F. W. Mount ;* Messrs. *Sorrell & Son.*

In re SOTTOMAIOR (A LUNATIC).

L. JJ. 1874 *July* 4; *Aug.* 1.

Lunacy Regulation Act, 1862 (25 & 26 *Vict. c.* 86), *s.* 3—*Inquiry when Lunacy commenced.*

A Portuguese gentleman whose domicil was in *Portugal*, whose property, with a very trifling exception, was in *Portugal*, and whose wife and only child were residing there, became lunatic in *England*, and had been so for some years. A petition was now presented by some relations in *England* for an inquiry as to his state of mind. Proceedings in lunacy were at the same time taken in *Portugal* by his wife, and the Portuguese Court issued a request to the English Courts to inquire into his state of mind. The wife applied here to have an inquiry as to the time when the lunacy commenced, it being desired by the Portuguese Court that such an inquiry should be made in *England :*—

Held, by *James*, L.J., that the 25 & 26 Vict. c. 86, s. 3, does not take away the power of the Court to direct such an inquiry where special circumstances render it desirable:

But *held*, that, in the circumstances of the present case, such an inquiry ought not to be directed, as it was not required for any purpose of the proceedings in *England*, and the finding might affect other parties who could not effectually intervene in the inquiry, and yet would probably be treated in *Portugal* as concluded by it.

THIS was a Petition presented by the son-in-law and the sister-in-law of *Gonzalo Sottomaior* for an inquiry as to his lunacy.

The lunatic was a native of *Portugal.* He came over to *England* in 1858 for a temporary purpose, and shortly afterwards became of unsound mind, since which time he had been residing with the Petitioners in *London* until very recently, when he had been placed in a lunatic asylum. He had a considerable landed property in *Portugal*, and his only property in *England* was a dividend of £208, payable under a composition deed. His wife

L. JJ. 1874 *In re* SOTTOMAIOR (A LUNATIC).

and his only child (a daughter) were resident in *Portugal*, and on the 18th of April, 1874, the Petition was ordered to stand over for them to be served with it.

The fact of the lunatic's unsoundness of mind was not questioned. The wife had commenced proceedings in *Portugal* to have him found lunatic, and the Portuguese authorities issued a document called "a rogatory letter," dated the 16th of April, 1874, addressed to "The Judges and any other magistrates of Her Britannic Majesty, and especially those of the City of *London*," requesting them to order an examination of the mental condition of the lunatic, and if he should be found lunatic, to order him to be delivered to his wife to be brought over to *Portugal*, she being, by the laws of *Portugal*, his guardian and the administratrix of his estate in that country.

The Petition having been served on the wife and daughter, came on to be heard before the Lord Justice *James* on the 20th of June, 1874, when his Lordship directed an inquiry as to Mr. *Sottomaior's* state of mind—nothing further to be done without an order of the Court.

An application was now made on behalf of the wife and daughter to vary the minutes of this order by adding an inquiry from what time the lunatic had been of unsound mind. It appeared, by instructions sent from *Portugal*, that the Portuguese Court desired this inquiry.

Mr. *Bristowe*, Q.C., for the wife and daughter:—

The *Lunacy Regulation Act*, 1853 (16 & 17 Vict. c. 70), s. 47, clearly gave power to the Court to direct such an inquiry as we ask for where there were special circumstances calling for it; but the 3rd section of the Act of 1862 (25 & 26 Vict. c. 86) is of more doubtful import, the question being whether the concluding words, "unless the Judge or Master shall otherwise direct," override the whole section. It is submitted that they do. It is provided in the later Act, sect. 2, that it shall be read as part of the former: it does not profess to be a repealing Act, and the 3rd section is not to be treated as repealing the 47th section of the earlier Act, unless it is found impossible to reconcile them. It is important

for the purpose of the proceedings in *Portugal* to have the time of the lunacy ascertained, it will be difficult and expensive for the Portuguese Courts to ascertain it, and this Court, according to the comity of nations, will do what it can to assist the Portuguese Court.

Mr. *Hemings*, for the Petitioners:—

I submit that the first part of the 3rd section of the later Act is absolute. The words "or Master" shew that the qualification cannot override the whole of the section, for the inquiry can only be directed by the Court.

Mr. *Alexander*, for a judgment creditor for £9000, who had been served:—

The judgment debt due to my client was contracted since the period at which it is alleged that the lunatic became of unsound mind. If on the inquiry it should be found that he became so in 1860, I shall be much prejudiced, for the foreign Court will give far higher importance to such a finding than the Courts here, and will probably treat it as conclusive. Even if I should have liberty to attend the inquiry, still I shall be prejudiced, for the wife and daughter, who are the best witnesses, are in *Portugal*, and I cannot procure their evidence.

SIR G. MELLISH, L.J.:—

Assuming that the Act of 1862 does not preclude an inquiry at what time a person became of unsound mind, I think that the special circumstances which will authorize the Court to direct such an inquiry must be such circumstances as make information on that head material for the purpose of the proceedings in the lunacy. Now in the present case we intend to give up the lunatic to the persons entitled to his custody under the Portuguese proceedings; this Court is not about to take upon itself the administration of the lunatic's property, and therefore does not require this information for the purpose of any proceedings before itself. Under these circumstances, it appears to me that we ought not to direct an inquiry the finding on which would doubtless be taken by the Portuguese Courts to have much greater weight than it

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would be taken to have here. If the parties who would be affected by the finding could have the matter properly fought out here, there would be no objection to the inquiry; but the judgment creditor, whose interests are most materially affected, would have no *locus standi* before the Master. The inquiry would be *ex parte*, and ought not to be made unless it is wanted for the guidance of the Court respecting further proceedings in the lunacy.

SIR W. M. JAMES, L.J. :—

On the construction of the Act of Parliament I do not, after the full discussion which has taken place, entertain a doubt that this Court still retains jurisdiction to direct the inquiry under special circumstances. It is, however, impossible to read the Act without seeing that it was the intention of the Legislature to prevent the inquiry except under very special circumstances, and the Court must find, not only that there are special circumstances, but that those special circumstances are such as make the inquiry desirable for the protection of the lunatic, and not prejudicial to any one else. I feel very gravely the force of what Mr. *Bristowe* has said—that it is a sort of duty, according to the comity of nations, for this Court to comply, as far as possible, with the request of the Portuguese Court, and to endeavour to ascertain, as far as possible, what that Court wishes us to ascertain. But the difficulty is this—that third persons are, or very probably may be, interested or involved in the question from what date the lunacy commenced. Now the practice of this Court does not enable those third persons effectually to protect their interests on such an inquiry, whether it take place before the Master or before a jury. The Petitioners may inform the Court in *Portugal* that we have simply confined the inquiry, according to the usual practice of this Court, to the present state of mind of the lunatic, and that this Court does not think fit to direct any inquiry as to the question at what period the alleged lunacy commenced, because, according to the practice in this country, third persons, whose interests may be involved in that question, have no means of effectually defending their interests upon such an inquiry, and that for this reason we do not direct the inquiry in the form asked.

L. JJ.
1874
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Aug. 1. Mr. *Sottomaior* having been found lunatic, their Lordships, this day, made an order declaring the costs of the Petitioners a first charge, and the costs of the judgment creditor a second charge, on the £208. A committee of the estate was appointed for the purpose of receiving that sum, and was directed to pay the above costs and hand over the balance to the solicitor of the lunatic's wife and daughter. Liberty was given for the removal of the lunatic to *Portugal*, to be delivered to his wife.

Solicitors: Mr. *John P. Poncione*, jun.; Messrs. *Tamplin, Tayler, & Joseph.*

In re NEWMAN'S SETTLED ESTATES.

L. JJ.
1874
July 25.

Settled Estates Act (19 & 20 *Vict. c.* 120), *s.* 23—*Timber Money—Permanent Improvements.*

Under the *Settled Estates Act* (19 & 20 Vict. c. 120), s. 23, money arising from timber cut under an order of the Court was ordered to be expended in erecting new farm buildings and other permanent improvements of the property.

BY the will of *Jane Newman*, dated the 1st of May, 1860, certain freehold estates were devised upon trust for the brother and sisters of the testatrix, as tenants in common, during their respective lives, with remainders over; the estates of the tenants for life not being made unimpeachable for waste. The will contained no powers of cutting timber.

In 1868 the trustees, and all the persons beneficially interested, presented a Petition under the *Settled Estates Act* (19 & 20 Vict. c. 120), stating that there was valuable timber (not ornamental) ripe for felling on the estate, and that it would be for the benefit of the persons interested that powers should be granted for cutting timber, and that the timber should be sold and the proceeds laid out in the improvement of the property; and praying that the Court would authorize the sale of a proper part of the timber, and that the proceeds, after payment of the costs of the application, might be paid to the trustees of the will, to be employed by them in the improvement of the property.

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After the Petition had been presented, an infant child was born to one of the tenants for life, and was made a Respondent.

On the 23rd of January, 1869, an order was made directing an inquiry whether, with a due regard to the interest of all parties entitled under the will, it was fit and proper, and for the benefit of the settled estate, to cut down and sell the timber (not ornamental) growing upon the estate or any part thereof, with liberty to the Petitioners to apply in Chambers for the sale of such timber, and for the application of the money arising by the sale thereof, and for the costs of the Petition.

Timber was accordingly, with the sanction of the Judge in Chambers, felled and sold; and the proceeds, amounting to £792, paid into Court. The costs of the Petition had been taxed and paid, and there remained in Court £143 18*s.* 11*d.* consols and £466 2*s.* 11*d.* cash.

The estate consisted of the following particulars: *Yearston Farm*, 300 acres; rent, £360. *Dudshill Farm*, 208 acres; rent, £280. *Field House Farm*, 60 acres; rent, £100. *High House Farm*, 14 acres; rent, £70.

A surveyor who was employed to inspect the farms reported to the trustees as to what was required to be done to put the buildings into proper order. The works which he reported to be necessary were divided into three heads: 1, the building new hop-kilns and granary, estimated at £404 10*s.*; 2, the conversion of the old hop-kilns and rooms into two cottages, estimated at £405 10*s.*; 3, various repairs and alterations on the farms, estimated at £578. It was deposed that all these works were essential for putting the property into good order and repair, and that they would permanently increase its value. The trustees had the first part of the work done upon another estimate, at a total expense of £364. They also executed some drainage work on the *Yearston Farm*, at a cost of £15 7*s.* 8*d.*, on an agreement with the tenant that he was to pay additional rent equal to £5 per cent. on the outlay.

The Petitioners now applied by summons that the fund in Court might be paid to the trustees, they undertaking to apply it in payment of the costs of the repairs and improvements made and to be made. At the request of the Master of the Rolls the case was heard by the Lords Justices.

Mr. *W. Pearson*, Q.C., and Mr. *Alfred Smith*, for the Petitioners, referred to the *Settled Estates Act* (19 & 20 Vict. c. 120), ss. 11 and 23, and the *Lands Clauses Act* (8 Vict. c. 18), s. 69; *Re Clitheroe's Settled Estates* (1); *Re Dummer's Will* (2); *In re Leigh's Estate* (3); *Re Buckinghamshire Railway Company* (4); *Ex parte Shaw* (5); *Ex parte Davis* (6); *Re Rudyerd's Trusts* (7); *Ex parte Rector of Holywell* (8); *In re Incumbent of Whitfield* (9); *Re Partington's Trust* (10); *Ex parte Corporation of Liverpool* (11); *In re Johnson's Settlement* (12).

Mr. *Woodroffe*, for the Respondent.

SIR W. M. JAMES, L.J.:—

The cases proceed on the principle that the erection of a building is substantially the same thing as the purchase of a new estate. No mischief can result from following these decisions. The order may be taken as asked.

SIR G. MELLISH, L.J.:—

I think that the authorities are too strong to be departed from. It would be mischievous to overrule such a course of decisions, though I am not prepared to say that, in the absence of authority, I should have decided the point in the same way.

Solicitors: Messrs. *Robinson & Preston*.

(1) 17 W. R. 345.
(2) 2 D. J. & S. 515.
(3) Law Rep. 6 Ch. 887.
(4) 14 Jur. 1065.
(5) 4 Y. & C. Ex. 506.
(6) 3 De G. & J. 144.
(7) 2 Giff. 394.
(8) 2 Dr. & Sm. 463.
(9) 1 J. & H. 610.
(10) 11 W. R. 160.
(11) Law Rep. 1 Ch. 596.
(12) Ibid. 8 Eq. 348.

L. JJ.
1874
Aug. 5.

WILLIAMS *v.* AYLESBURY AND BUCKINGHAM RAILWAY COMPANY.

[1871 W. 246.]

Building Rectory—Tenant for Life—Purchase-money—8 *Vict. c.* 18, *s.* 69.

An arrangement was, with the consent of all proper parties, made for the rebuilding of a rectory house, part of the money to be advanced by the Commissioners of Queen *Anne's* Bounty, and part to be supplied by money agreed to be paid by a railway company for a piece of the glebe. The rebuilding proceeded, but the railway company were unable to pay, and the money required was advanced by the rector. When the railway company had paid the money the rector petitioned to have it paid to him :—

Held, that the Court had no power to make the order.

Quære, whether money arising from the sale of glebe land can, under the *Lands Clauses Consolidation Act*, be applied towards the rebuilding of a rectory.

THE *Aylesbury and Buckingham Railway Company* had taken part of the glebe of the rectory of *Waddesdon*, and the price was fixed at £700. The rectory house was old and dilapidated, and, with the consent of the bishop and the patron, an arrangement was made that the old house should be pulled down and a new house built on the site, at an expense of £1900, the Commissioners of Queen *Anne's* Bounty advancing £1140, and £700 to be supplied by the money for the land taken by the railway company, the patron to pay the rest. The rebuilding went on, but the railway company fell into difficulties, and did not pay the £700. The rector thereupon advanced the money, and the building was completed. The rector then filed a Bill against the railway company for specific performance, and ultimately the railway company paid the purchase-money into Court. The rector then presented a Petition in the suit to have the money paid to him. The Master of the Rolls doubted if he had power to order the payment, and the Petition now came before the Lords Justices.

Mr. *Townsend*, for the rector :—

Everything has been done regularly, and if the money had at once been paid into Court this application of it would have

been sanctioned under sect. 69 of the *Lands Clauses Consolidation Act*, 8 Vict. c. 18. It is merely the default of the company which has caused any question. The Master of the Rolls felt himself in a difficulty because of some observations in *In re Leigh's Estate* (1); but there the remaindermen opposed, here no one opposes. In *Ex parte Davis* (2) the expense had been voluntarily incurred by the tenant for life, and yet the money was paid to him.

[SIR G. MELLISH, L.J.:—No doubt it might have been done. A house might be built on other land, and then the old house and land might be sold and the new house and land bought, but it is very doubtful whether this is a proper application of the money under the Act. This is not a purchase of messuages, lands, tenements, or hereditaments.]

We are informed that money paid for the purchase of land has been applied to building rectories in more than thirty cases, and the practice of the Court on that point is settled: *In re Incumbent of Whitfield* (3).

Mr. *Swan*, for the railway company.

SIR W. M. JAMES. L.J., said that the Court had no more power to order this money to be paid to the rector than to order any other sum of money to be paid to him. The Court had held that a new building in some sense was land, and had gone to some extent in allowing money to be so applied, but their Lordships could not go beyond the decisions, which did not authorize the payment of this money. It was unfortunate for the rector, but the Court had no power.

SIR G. MELLISH, L.J., was of the same opinion. It was a hard case, but it was impossible to say that this would be applying money in the purchase of other messuages, lands, tenements, or hereditaments. Nor could such a thing be done merely because it was desirable and all parties consented. The order asked for could not be made.

Solicitors: Messrs. *Evans, Foster, & Rutter;* Messrs. *Jennings, White, & Buckston.*

(1) Law Rep. 6 Ch. 887. (2) 3 De G. & J. 144. (3) 1 J. & H. 610.

L. JJ. 1874 May 27.

In re LONDON, BOMBAY, AND MEDITERRANEAN BANK. *Ex parte* CAMA.

Accommodation Bills—Claim in Winding-up—Mistake—Amount—Balance—Security realized.

5 Ch. D 258
16 C.L.D. 592

A merchant in *Bombay* bought of a bank bills on their *London* branch for £25,000, giving for them £5000 in cash and £20,000 in bills on a firm in *London*, consisting of himself and another person. The bank bills were all indorsed to the firm in *London*, and were all accepted. The merchant's bills were sent to the *London* branch of the bank and were accepted by the *London* firm. The bank was wound up, and the merchant and his partner each became insolvent; the *London* firm holding at the time of the winding-up bills to the amount of £19,000, and the bank having parted with the bills for £20,000:—

Held, that under the circumstances the bills were not accommodation bills, and that the trustees of the *London* firm were entitled to prove for the £19,000 in the winding-up:

Held, also, that the principle as to proving for cross accommodation bills does not apply when the bills are in the hands of third parties.

The trustees of the *London* firm had sent in a previous claim to prove for £5000, taking that amount as the balance between the bills for £25,000 and the bills for £20,000, and not being aware that the bank had parted with the bills for £20,000. At the time of the previous claim the trustees held securities which had since been realized by them:—

Held, that, notwithstanding the previous claim made by mistake, the trustees might prove for the £19,000; and that the claim would be considered as made when the previous claim was made, so that the trustees representing the *London* firm were not bound to give credit for the money received by realizing the security.

Order of *Hall*, V.C., affirmed.

Ex parte Macredie (1) considered.

IN the year 1866 *Bomanjee Framjee Cama* (carrying on business at *Bombay* as *B. F. Cama, Sons, & Co.*) bought from the *Bombay* branch of the *London, Bombay, and Mediterranean Bank* twenty-two bills of exchange, drawn on the *London* branch of the bank, for various sums, amounting together to £25,000, and payable on various days.

For these bills he gave £5000 in cash and a further sum for discount, and bills for £20,000 drawn by him on a firm called *Cama & Co.*, of *London*, consisting of himself and of one *Bomanjee*

(1) Law Rep. 8 Ch. 535.

Pestonjee. The bills bought by him were indorsed to *Cama & Co.*, sent to *London*, and accepted by the bank; and the bills given by him were remitted to the bank in *London*, and were accepted by *Cama & Co.*, in *London*. The bank being unable to meet the first set of bills accepted by them for £10,000, and payable in May, 1866, deposited with *Cama & Co.*, of *London*, a promissory note of *Landau & Co.* for £10,000 by way of security.

On the 20th of July, 1866, an order for winding up the bank was made. On the 6th of August a deed was executed by *B. F. Cama* assigning his property to trustees for the benefit of his creditors; and on the 22nd of August, 1866, a deed was executed by *Bomanjee Pestonjee* assigning his property to trustees (not the same as those of *B. F. Cama*) for the benefit of his creditors.

In January, 1867, the trustees of *B. F. Cama* and the trustees of *Bomanjee Pestonjee*, representing *Cama & Co.*, sent in a claim under the winding-up, as creditors for £5000 in respect of the balance on the bills. This they afterwards alleged to be a mistake, as in making out the account (which was sent with an affidavit as to their claim) they had set off against the bills for £25,000 held by them the bills for £20,000 which had been given to the bank, but which the bank had then parted with, as the trustees afterwards discovered. At the date of the winding-up *Cama & Son* held, in fact, £19,000 of bills, having parted with bills for £6000.

After this claim had been sent in, the trustees of the two estates, representing *Cama & Co.*, realized more than £8600 on the promissory note of *Landau & Co.*

The trustees of the two partners, as representing *Cama & Co.*, now sought to prove against the bank for £19,000 on the bills still held by them.

The Vice-Chancellor *Hall* allowed the claim, and the official liquidators appealed.

The circumstances of the case are stated at greater length in the report of *London, Bombay, and Mediterranean Bank* v. *Narraway* (1).

Mr. *Dickinson*, Q.C., and Mr. *Lake*, for the Appellants:—

We say that these were mere accommodation bills, and that the

(1) Law Rep. 15 Eq. 93.

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principle of *Ex parte Walker* (1) governs the case: *Ex parte Macredie* (2). We gave bills for £25,000, and took bills for £20,000. *Ex parte Rawson* (3) shews that such bills cannot be proved on unless there is a surplus. We have had to pay dividends on the £20,000, and we cannot have to pay again on the £25,000. *Cama & Co.* cannot prove in competition with their own creditors.

Moreover they have claimed for £5000 on a different principle, giving credit for the £20,000 held by the bank, but not for the £6000 of bills which they had parted with, and they cannot now be allowed to charge: *Kellock's Case* (4). The trustees must have known that the £20,000 bills had been discounted.

Mr. *Lindley*, Q.C., and Mr. *Kekewich*, for the trustees, were called upon only as to the time when the claim was made.

SIR G. MELLISH, L.J.:—

I am of opinion that the decision of the Vice-Chancellor in this case was correct on both points.

The first question is, whether the trustees, who represent the *London* firm of *Cama & Co.*, are entitled to prove against the *London, Bombay, and Mediterranean Bank* in respect of bills of exchange drawn by *B. F. Cama* in *Bombay* upon the bank, and accepted by the bank, and now held by *Cama & Co.* of *London*, there being a partner in the *London* firm who was not a partner in the *Bombay* firm.

Now, in my opinion, it is quite clear that if none of these parties had become insolvent, an action at law could have been maintained by the *London* firm of *Cama & Co.* against the *London, Bombay, and Mediterranean Bank* in respect of these bills:—[His Lordship then stated the facts, expressing his opinion that the indorsement to the *London* firm was for value.]

In the first place, I think it was not a mere exchange of accommodation acceptances, but was a purchase of bills; and although they were in great part, although not entirely, paid for by giving other bills at different dates, still I think they were not accom-

(1) 4 Ves. 373.
(2) Law Rep. 8 Ch. 535.
(3) Jac. 274.
(4) Law Rep. 3 Ch. 769.

modation acceptances in respect of which no action at law could lie by the drawers' against the acceptors. It seems to me, however, that it is hardly necessary to consider that point, because it would not be an action brought by the drawers against the acceptors, but by the indorsees for value.

I cannot see how the doctrine of *Ex parte Walker* (1) can possibly apply to a case where there are, in fact, three firms, and where the firm which seeks to prove is not the same as that which made the arrangement about the exchange of acceptances, if there was an exchange of acceptances. Indeed, I doubt whether I was right in what I said in *Ex parte Macredie* (2) that possibly the doctrine of *Ex parte Walker* might apply not only to a case where there was an exchange of accommodation acceptances, but might apply to a case where one bill was, in some respects, the consideration for another bill. I have great doubt on further consideration whether that was right, and whether the rule was not that which was stated by Lord *Selborne* in that case, namely, that proof could only be admitted when an action at law would lie, and not in a case of pure accommodation acceptances in respect of which, if there was no bankruptcy, no action at law would lie.

However that may be, it is not necessary now to decide the question, because in this case the bills having, as it appears to me, been indorsed for value, I think it is quite clear that the indorsees might have maintained an action at law, and therefore are entitled to prove.

Then, with respect to the second question, that depends upon the time when the claim was made by the trustees of the partners in the *London* firm to prove as against the bank. If it was made before they realised the security of *Landau's* promissory note, then they are not bound to give credit for the sums they have received on the note, but may prove for the whole amount, subject of course to this, that when they have received 20*s.* in the pound on that part of the claim, namely, the first £10,000 of bills, in respect of which *Landau's* promissory note was given, then they could receive no further dividends in respect of that

(1) 4 Ves. 373. (2) Law Rep. 8 Ch. 535, 539.

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sum. But if the claim was not made until after they had received something on *Landau's* note, then they must give credit for the sum they had so received.

But I am of opinion that the claim must be treated as having been made at the time when their account was first sent in. It is true that the claim was an incorrect claim, but it appears to me that the affidavit which accompanied it states the facts sufficiently to enable the Court to see what the mistake was. It seems to have been a mistake of fact, because those who made the claim supposed that the bills which had been accepted by *Cama & Co.* were in the possession of the bank, and on that false assumption credit was given for those bills, and on the other side was taken for the whole of the £19,000 of bills in respect of which the claim is now made, and indeed for £6000 more. No doubt they now seek to amend that proof, and I am of opinion that the rectifying of that mistake ought not to be held a new proof, so as to oblige them to give credit for the sums which have now been received on *Landau's* note.

I think the decision of the Vice-Chancellor is correct on both points, and that the appeal must be dismissed with costs.

Sir W. M. James, L.J.:—

I am of the same opinion.

Solicitors for the Appellants: Messrs. *Lewis, Munns, & Longden.*

Solicitors for the trustees of *Cama & Co.:* Messrs. *Waller & Handson.*

In re COUNTY PALATINE LOAN AND DISCOUNT COMPANY.

L. JJ.
1874
June 2.

CARTMELL'S CASE.

Directors—Delegated Power—Purchase of Shares—Manager—Notice—Execution of Transfer.

The directors of a company having under the articles of association power to buy shares in the company and to appoint a manager, appointed a manager. A shareholder agreed with the manager for the sale to the company of his shares, and executed a transfer of his shares to two directors who were trustees for the company. The transfer was not executed by the two directors, but was registered:—

Held, that the directors had no authority to delegate to a manager the power to buy shares:

Held, on the facts, that the directors had not delegated that power, or ratified the transaction with the shareholder:

Held, that the directors were not considered to have such knowledge of the books of the company as to be affected with knowledge of the transaction:

Held, that the transfer was invalid, and that the shareholder was a contributory.

Decision of the Vice-Chancellor of the County Palatine of *Lancaster* affirmed.

THE *County Palatine Loan and Discount Company* was registered in 1862. The objects were stated to be the carrying on the business usually transacted by loan and discount companies. The articles of association provided that any holder of a share who proposed to transfer the same should serve notice on the company in writing of his proposal; if the company did not within seven days declare their dissent they should be deemed to have assented to the transfer, and should cause the same to be registered; if they dissented they should purchase the shares at the market price and pay for them out of the assets of the company. It was further provided that the directors might invest any stock or shares in the name of trustees, and that the trustees might be registered as holders of shares purchased for the benefit of the company. And it was provided that:

"104. The directors may purchase any share from any share-

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holder, on behalf of the company, out of its funds; or may release any shareholder from his shares, on such terms as the directors think fit.

"109. The directors may appoint a general manager, at such salary and with an obligation to perform such duties as they may determine."

On the 19th of June, 1866, the directors passed a resolution, simply appointing *O. Hopwood* the general manager of the company. In July, 1866, *W. Davis* and *J. Ellis*, two of the directors, were appointed trustees for the purchase and sale of shares in the company on the company's account.

W. Cartmell had fifty-seven £10 shares in the company, £5 paid, and in June, 1871, he called at the office of the company, and told *Hopwood* that he wished to sell his shares. On the 30th of June, 1871, *Cartmell* went again to the office, where he was told by *Hopwood* that the company would purchase the shares for £6 10*s.* a share; and thereupon *Cartmell* executed a form of transfer of the shares to *Davis* and *Ellis*. The purchase-money was allowed by *Cartmell* to remain with the company as a deposit, and he used to receive interest upon it, and the dividends on the shares were carried to the credit of the company; all of which appeared in the books of the company. Neither *Davis* nor *Ellis* executed the instrument of transfer, but the transfer was entered on the register of transfers.

The company was ordered to be wound up, and *Cartmell* was by the District Registrar placed on the list of contributories in respect of these fifty-seven shares. The Vice-Chancellor of the County Palatine of *Lancaster* refused to remove the name, and Mr. *Cartmell* appealed.

It appeared that altogether four purchases of this kind had been made by *Hopwood* on behalf of the company, the last in September, 1867. *Davis* and *Ellis* had never executed the instruments of transfer. Some of the shares had been sold, and transferred to the purchasers, and the transfers were registered, but *Davis* and *Ellis* did not even then execute the transfers. *Hopwood* deposed that the whole management was left to him, and that he had a general authority to purchase shares provided that the price did not exceed a premium of 30*s.* Also that he every week prepared

a statement shewing the transactions of the company, including the transfers of shares to the trustees, and that he every week submitted this statement to the directors, including *Davis* and *Ellis*; and that every year a half-yearly statement of accounts shewing the number of shares held by the company was sent to every shareholder. There was also evidence that *Davis* and *Ellis* continually attended as directors.

Davis and *Ellis* deposed that since the winding-up they had discovered that certain shares had been transferred to them, but that these transfers were made without their knowledge or consent, and without the knowledge or consent of the company, and were always carefully concealed by *Hopwood* from the directors. And they denied that he was authorized to buy shares in the company. They further denied all knowledge of the dealings with *Cartmell*.

Mr. *Jackson*, Q.C., and Mr. *Clare*, for the Appellant:—

No form of transfer is prescribed by the articles, and a verbal assent is enough. We contend that there was a good transfer; and if not, that the company is bound by the acts of their manager; that he had full power to buy these shares; and that the directors must have known all about it, and be taken to have ratified the transaction.

Mr. *North*, for the official liquidator:—

It is clear that a man who is once a shareholder is always a shareholder until he has got rid of his shares, and a transfer without the assent of the transferee is not sufficient: *Addison's Case* (1); *Heritage's Case* (2). We say that the manager had no authority to make this arrangement. The directors had, no doubt, under their articles of association, power to appoint a manager, but they could not delegate to him such a power as this: *Howard's Case* (3). He could not have bought all the shares, and how many might he have bought? Even if they had power, there is no evidence that they delegated it, or that they knew anything of these transactions: *Stewart's Case* (4).

(1) [illegible], 5 Ch. 294.
(2) Ibid. 9 Eq. 5.
(3) Law Rep. 1 Ch. 561.
(4) Ibid. 574.

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Mr. *Crossley*, for other parties.

Mr. *Jackson*, in reply:—

The directors must have power to delegate the right to buy shares. As a body, they could not negotiate with a vendor, and must employ some one for such business. They had done so, and must have been cognisant of those dealings: *Joint Stock Discount Company* v. *Brown* (1). It is on them to shew that they were not aware. If a shareholder has the right to have his name taken off the register, the fact that no name is substituted cannot signify: *Fyfe's Case* (2). Surely a shareholder cannot be injured by any neglect or informality committed by the manager of a company—the very man whose duty it is to do what is right. After *Cartmell* had parted with his shares he had no right to inspect the books, and how could he find out that the shares had not been duly transferred? Perhaps a dry legal estate remains in him, but that is all.

SIR G. MELLISH, L.J.:—

It appears to me that the order of the Vice-Chancellor must be affirmed, though I entirely agree with His Honour that it is a very hard case upon Mr. *Cartmell*.

The question to be determined is, whether Mr. *Cartmell*, who was the holder of these shares, has transferred them, or in any way got rid of them, so as to cease to be a shareholder. There were three ways in which this might be done: first, by a transfer in pursuance of the articles respecting transfers; secondly, by selling them to the company under the 104th article; thirdly, by a release under the power in the same article which authorized the directors to release a shareholder.

It is clear that the Appellant cannot successfully allege that he has transferred the shares, for though no form of transfer is prescribed, still it is of the essence of a transfer that it should be accepted by the transferee. But here it has been positively sworn that *Davis* and *Ellis* never gave any authority to accept the transfer, and therefore the transfer will not discharge Mr. *Cartmell*.

The principal question is, whether there was a valid purchase by

(1) Law Rep. 8 Eq. 381. (2) Law Rep. 4 Ch. 768.

the directors in a transaction which purported to be a transfer to the company. That depends upon the question whether what Mr. *Hopwood* did was within the scope of the manager's powers under article 109. It appears to me that a mere power to appoint a general manager would not authorize the directors to transfer to him the power to purchase shares; because that power is by the articles expressly given to the directors themselves; whilst the only duties which they could delegate to the general manager are those which belong to the management of the ordinary commercial business of such a company. It is true that a company of that kind must act by its manager, but the directors could not delegate to another person those powers which they would not have had except under this peculiar provision in the articles. But if they had power to delegate their authority, they have not done so, for I do not think that the resolutions of 1866 amounted to a general authority for Mr. *Hopwood* to purchase any shares which might be offered.

It appears, therefore, to me that the contract to buy these shares did not bind the directors. Then comes the question whether the directors have ratified the purchase. If the evidence of Mr. *Hopwood*, that he informed them, is to be taken as true, then it would be different; but I cannot depend on his evidence alone, for both *Davis* and *Ellis* say that they had no knowledge of the purchase, nor was there any entry on the minutes relating to it. Nor do I think that the directors must be taken to have had notice from the entries on the books of the company. No doubt it could, by a diligent examination of the books, have been discovered, but the directors had no reason to imagine that the purchase had been made.

Then comes the question, whether, though *Hopwood* had no power to purchase the shares, the directors are not, so to speak, estopped from saying that the company had not bought the shares. This case does not come within the principle of the decisions in *Royal British Bank* v. *Turquand* (1) and *In re Land Credit Company of Ireland* (2). In that case the principle is illustrated by the Lord Justice *Selwyn*, who says (3): "If, when an act within

(1) 6 E. & B. 327. (2) Law Rep. 4 Ch. 460.
(3) Law Rep. 4 Ch. 469.

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the scope of the powers of the board of directors is done by them, or (which is the same thing) is ratified and adopted by them, a person contracting with the directors is not bound to see that certain preliminaries which ought to have been gone through on the part of the company have been gone through; still less, in my judgment, are innocent holders of a negotiable security bound to inquire whether those preliminaries have been observed."

This is not a case where the directors had not complied with some preliminary required by the articles, but is a case where an agent of the company has done something beyond any authority which was given to him, or which he was held out as having. If it was in the ordinary scope of his duty the company would be bound even if he had orders not to do it, but here he had no such authority, and his saying that he had it amounts to nothing.

SIR W. M. JAMES, L.J.:—

This is a very hard case upon Mr. *Cartmell*, but I am unable to come to any other conclusion than that which the Vice-Chancellor and the Lord Justice have come to.

It was alleged that the manager had been in the habit of buying shares, but the last case had occurred four years before, and there was no proof of any such practice having grown up within the knowledge of the directors.

As to the question of law, Mr. Justice *Maule*, in *Smith* v. *Hull Glass Company* (1), said (2): "This is the simple case of an individual, or a body corporate, carrying on business in the ordinary way, by the agency of persons apparently authorized by him or them, and acting with his or their knowledge. The case differs in no respect from the ordinary one of dealings at a shop or counting-house; the customer is not called upon to prove the character or the authority of the shopman or clerk with whom he deals; if he is acting without or contrary to the authority conferred upon him by his employers, it is their own fault." And he said further (3): "The Plaintiffs could only know that the directors had power to appoint persons to perform the duties they appeared to be doing: and they had a right to assume that they were duly and properly appointed."

(1) 11 C. B. 897. (2) 11 C. B. 928. (3) 11 C. B. 929.

These words are very similar to those used by the Lord Justice in this case, and appear to state the true principle applicable to cases of this kind, that where the dealing was in the ordinary course of business, it would be implied that the agent had authority to bind his principal. But that was not the case here, and Mr. *Cartmell* must bear the consequences.

The appeal must be dismissed with costs.

Solicitors for the Appellant: Messrs. *Clarkson, Son, & Greenwell,* agents for Mr. *Ponton, Liverpool.*

Solicitors for the Official Liquidator: Messrs. *Sharpe, Parkers, & Co.,* agents for Messrs. *Harvey & Alsop, Liverpool.*

Ex parte JAY. *In re* BLENKHORN.

Bankruptcy—Bills of Sale Act (17 & 18 *Vict. c.* 36), *s.* 7—*Apparent Possession —Packing up Goods.*

A mortgagee under an unregistered bill of sale of furniture and live stock at a house, sent two men into the house on the 10th of February to take possession of the goods. They remained in the house, but allowed the debtors and their family to use the goods as usual till the 14th of February. On the 11th of February the debtors executed another bill of sale, which comprised substantially all their property, to another creditor, to secure an antecedent debt. Early in the morning of the 14th of February the first mortgagee sent vans to the house, and the men in possession commenced to pack the furniture and load the vans. At half-past twelve o'clock on the same day the debtors filed a petition for liquidation. The furniture and live stock at the house were carried away by the first mortgagee before the evening:—

Held (reversing the decision of the Chief Judge in Bankruptcy), that the furniture and live stock were in the apparent possession of the debtors until the morning of the 14th of February, within the 7th section of the *Bills of Sale Act* (17 & 18 Vict. c. 36), but ceased to be so when the men in possession began to pack the goods and put them in the vans; and that as the debtors committed an act of bankruptcy on the 11th by the assignment of all their property, the first bill of sale was void as against the trustee in the liquidation, and the trustee was entitled to the proceeds of the sale.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy, discharging an order of the Judge of the *Nottingham* County Court.

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Sarah Anne Blenkhorn and *Eleanora Maria Blenkhorn* were single ladies, who kept a school for young ladies near *Caythorpe*.

On the 16th of June, 1873, the two Misses *Blenkhorn* and their father, *George Blenkhorn*, executed a bill of sale of all their household furniture, fixtures, books, plate, and pictures, and all horses, carts, cows, and other chattels at the house, to *Barnett Cohen*, by way of mortgage for securing a present advance of £144, which was to be repaid by twelve monthly instalments, and power was thereby given to *Cohen* to take immediate possession of the property comprised in the bill of sale, notwithstanding the equity of redemption, and in case of default in payment of any of the instalments to sell the property.

This bill of sale was not registered.

On the 26th of January, 1874, the Misses *Blenkhorn* assigned the same property to *John Kendal* by way of mortgage, for securing the repayment of £100 advanced by him. This was not registered.

On the 11th of February, 1874, the Misses *Blenkhorn* and their father executed another bill of sale of all the household furniture, live and dead farming goods, chattels, and effects in and about their house, to the *Nottingham Equitable Loan, Discount, and Investment Company*, by way of mortgage to secure a past debt of £98, with a power of sale in case of default.

This bill of sale was duly registered.

On the 10th of February, 1874, the day before the execution of the last-mentioned bill of sale, *Cohen* sent two men to take possession of the furniture and other property comprised in his security. These men remained in possession, and slept in the house from that time, but did not disturb or remove, or in any way interfere with the debtors' goods, but allowed the debtors to continue in the occupation and enjoyment of the goods, and to carry on the school in the usual manner until the morning of the 14th of February. During that time negotiations for an arrangement went on between the debtors and *Cohen's* men who were in possession.

About nine o'clock on the morning of the 14th of February *Cohen's* men began to pack up the furniture in the house, and about ten o'clock two vans were brought into the garden, and the

men commenced placing the furniture of the principal rooms in the vans.

About three o'clock a third van was brought to the house and loaded, and at five o'clock all the vans were driven away, and some of the cows and a pony and chaise were also removed.

The bed-room furniture and kitchen utensils were not taken away, but one of the men remained to keep possession of them.

At half-past twelve o'clock on the same day, while this was going on, the Misses *Blenkhorn* filed a petition for liquidation, under which a trustee was appointed. The goods taken were afterwards sold by *Cohen* for £130.

Under these circumstances the County Court Judge was of opinion that the bill of sale to *Cohen* was void as against the trustee, and that the proceeds of the sale of the goods taken by him ought to be given up to the trustee.

From this decision *Cohen* appealed to the Chief Judge in Bankruptcy, who held that the possession taken by him under his bill of sale was not merely formal within the meaning of the *Bills of Sale Act* (17 & 18 Vict. c. 36), s. 7, and that he was entitled to keep the proceeds of the sale (1).

(1) 1874. May 26.

SIR JAMES BACON, C.J.:—

The question in this case is simply one of fact. The *Bills of Sale Act*, although it does not positively enact that every bill of sale shall be registered, requires in effect that it shall be registered, because if it is not registered all goods which are in the apparent possession of the bankrupt at the time of the bankruptcy will be held to be the property of the trustee, and not of the holder of the bill of sale. The question therefore is simply whether at the time of the commencement of the liquidation, which is said to have been at half-past twelve o'clock on the 14th of February, the goods which had been taken possession of on the 10th of February, four days before, were or were not in the apparent possession of the debtors. Well, now, taking the facts which have been proved before me, in my opinion no jury could hesitate on the subject for a moment. On the 10th of February a man comes armed with a bill of sale, lays hands upon all that is included in the bill of sale and takes possession, and leaves two men in possession. That is not mere formal possession. That is positive, actual, legal possession. To what end were the two men put into possession? To prevent anybody else touching those goods. In my opinion, it would be a most violent perversion of words to say that the possession then taken was a nominal or formal possession. It was the best possession that could be taken under the circumstances. The removal did not instantly follow, probably in consequence of the request of the debtors. That part of the case is not made very clear, and it is not of very great importance under what

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From this decision the trustee appealed.

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the Appellant:—The *Bills of Sale Act* (17 & 18 Vict. c. 36), s. 1, makes every

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circumstances it was that the broker who had by his men had possession of, and held adversely to, all the rest of the world, the chattels comprised in the bill of sale, did not choose to enforce, or had not the means of enforcing, the removal of them. The removal has nothing to do with it. The possession is the thing that is to be considered, Then on the morning of the 14th, there being no reason for forbearing any longer, the removal of the goods is commenced. Can any case be found—certainly none has been referred to—which would induce me to hold that, where the actual possession is proved and the removal has commenced and is in progress, the completion of that act so begun can be frustrated by the commission of an act of bankruptcy? None of the cases in the slightest degree affect that. Then I find that with reasonable diligence, with no circumstance that would at all call in question either the good faith or the prudence or propriety of what was done on that 14th of February, as soon as it could be effected, the whole of the goods were removed. The men never ceased to hold the possession until the things were brought down upon the lawn and loaded upon the carts. In my opinion, the Act of Parliament does not in the slightest degree touch this case. There has been an attempt to shew that what was taken was mere formal possession, and two cases, *Ex parte Hooman* (Law Rep 10 Eq. 63), and *Gough* v. *Everard* (2 H. & C. 1) were referred to. *Ex parte Hooman* was a case in which the owner of the bill of sale had put a man into what was clearly nominal possession, and only nominal possession, for he went into possession on the 28th of October; he retained possession until the 16th of November, and he then gave up the possession to another agent of the Respondent; so that for months that possession which in the beginning was, and was meant to be, formal and nothing else, had been continued down to the very time when the question was under litigation. *Gough* v. *Everard* (2 H. & C. 1), in my opinion, does not touch the case at all; but in the course of the argument upon *Ex parte Hooman* reference was made to a case which has not been referred to on this occasion—a case of *Vicarino* v. *Hollingsworth* (20 L. T. (N.S.) 362), the facts of which are thus stated in the judgment in *Ex parte Hooman* (Law Rep. 10 Eq. at p. 68): "A bill of sale had been executed by a trader to secure an advance of money. The lender, on the day of the execution of the bill of sale, sent a person who took and retained possession of the chattels assigned: and it would appear that they had been actually removed and sold; but whether before or soon after the bankruptcy, which happened within a week of the execution of the bill of sale, does not distinctly appear, nor is it material. So that no question did or could arise respecting its registration. The assignees in bankruptcy brought an action against the lender for money had and received to their use. The only ground upon which they claimed was that within the terms of the statute in bankruptcy the goods were at the time of the bankruptcy, by the consent and permission of the true

unregistered bill of sale void against creditors in case of bankruptcy, so far as regards all chattels which, after the expiration of twenty-one days from the execution of the bill of sale, shall be "in the possession, or apparent possession, of the person making such bill of sale;" and the last clause of the 7th section provides that "Personal chattels shall be deemed to be in the apparent possession of the person making or giving the bill of sale so long as they shall remain or be in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or as they shall be used and enjoyed by him in any place whatsoever,

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owner, in the possession, order, or disposition of the bankrupt. This raised a mere question of fact, as 'order and disposition' is in all cases only a question of fact. It being proved that the agent who had taken possession was a young woman who lived in the house with the bankrupt and his family, took her meals with them, sat in the same rooms, and lived as one of the family, it was urged, on the part of the Plaintiffs, that the possession by her was not real and substantial, but colourable, and that the goods, notwithstanding her presence in the house, remained in the ostensible possession of the bankrupt, and with the consent of the true owner, were in his order and disposition. The learned Judge who tried the cause directed the jury, 'if they came to the conclusion that the young woman was *bonâ fide* in possession of the furniture, so that she would not have allowed the bankrupt or any one else to deal with it contrary to her instructions, to return a verdict for the Defendant,' which they did. On a motion for a new trial on the ground of misdirection . . . . it was said by the Lord Chief Justice that the current of recent decisions had been less in favour of assignees than formerly. And this may well be in cases of 'order and disposition;' but cannot, I think, in any way influence the matter now before the Court." The possession of the young woman in *Vicarino* v. *Hollinsworth* was infinitely more questionable than such possession as was taken here. Here it was exactly in the ordinary course of business. The owner of the bill of sale sends his men to take possession, and never relinquishes it from that moment until the whole of the chattels comprised in the bill of sale and seized by them on the 10th of February are carried off the premises on the 14th. As a matter of fact, in my opinion, this case is one which does not admit of question for a moment.

I am, therefore, of opinion that at the time of what is said to have been an act of bankruptcy, namely, the execution of the bill of sale on the 11th of February, the possession of *Cohen* was actual and positive, and not completed only because of the difficulty of carrying away the pianofortes and such like things except by means of a van. In my opinion, the right of the bill of sale holder is clear, and is not to be questioned; and upon the facts as they are admitted and agreed to here, I am of opinion that he is entitled to retain the proceeds of the goods removed until his debt secured by the bill of sale is settled.

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notwithstanding that formal possession thereof may have been taken by or given to any other person." The question in the present case turns upon the true construction of this last clause. At the time when the petition for liquidation was filed none of the goods had been removed; the formal or apparent possession which had been taken by *Cohen's* men had not ceased, and the bill of sale as regarded them was void. The fact of the goods or some of them being in the vans made no difference; for there was nothing to shew to whom the vans belonged, or by whom the goods were about to be removed: *Ex parte Lewis* (1); *Gough* v. *Everard* (2); *Davies* v. *Jones* (3); *Ex parte Hooman* (4). At all events, the possession was merely formal on the 11th of February, and it is clear that the mortgage to the *Nottingham Company* which was made on that day included substantially all the debtor's property, and being for an antecedent debt was an act of bankruptcy, and overrides the sale by *Cohen*.

Mr *Little*, Q.C., and Mr. *Robertson Griffiths*, for *Cohen*:—

Cohen was not in formal but in actual possession when the petition was presented. He took possession with the *bonâ fide* intention of selling, and had been making arrangements to do so. His men began to pack the goods and load them in the vans early on the 14th of February, before the petition was presented; and therefore, even if the possession was only formal before the 14th of February, it ceased to be so as to all the goods on the morning of that day: *Carr* v. *Acraman* (5).

With respect to the mortgage to the *Nottingham Company*, there is no evidence that it comprised all the debtor's property; and if the decision of the Court should turn on that instrument, we ask for further inquiry on that point.

SIR W. M. JAMES, L.J.:—

Subject to the question as to the further inquiry, I am of opinion that the decision of the County Court Judge is right, and that the decision of the Chief Judge cannot be sustained. The

(1) Law Rep. 6 Ch. 626.
(2) 2 H. & C. 1.
(3) 10 W. R. 779.
(4) Law Rep. 10 Eq. 63.
(5) 11 Ex. 566.

question here is, whether there was actual or apparent possession of the goods which were comprised in the bill of sale to *Cohen* in the persons who had executed that bill of sale. Now it is admitted that, four days before the 14th of February, when the petition was filed, the mortgagee under the bill of sale put two men in possession of the property; but notwithstanding that, the property being in a boarding school, the school went on, and the young ladies continued their usual studies; the furniture was used, the beds were slept in, and it is plain that the whole apparent course and conduct of the household went on exactly in the same way as usual, the men being there for the purpose, no doubt, of preventing any removal of the goods. Now, that is, to my view, exactly the kind of apparent possession which was aimed at by the last clause of the 7th section of the *Bills of Sale Act*. It seemed to all the world that the ladies held their school, and they and their scholars had the use and enjoyment of the things which were the subject of the bill of sale. There were the cows also, and the pony and carriage, all of which continued to be used in the same way. I agree that the formal possession ceased to be a formal possession, and became an actual possession not to be attacked by the *Bills of Sale Act* on the morning of the 14th; for early on that morning the persons in possession brought vans, and, as rapidly as they could, began packing up the furniture. They took the things out on to the lawn and put them as fast as they could into the vans, and were in the course of removing them when the act of bankruptcy which was relied on was committed, which did not take place until half-past twelve on the same day. I cannot say that that was not as strong an assertion of ownership as could be made—not formal, but real ownership—particularly having regard to the character of the property and business.

That makes it important to ascertain whether there was an act of bankruptcy prior to the morning of the 14th; and certainly, having regard to the fact that there were three bills of sale of the same property, and that the ladies were in insolvent circumstances, the strong presumption is that the bill of sale to the *Nottingham Company*, which is alleged to be the act of bankruptcy, did include substantially the whole of the property of the debtors within the meaning of the cases. But as it is suggested that this was not

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properly inquired into, and that there was really no positive evidence upon that subject, the Lord Justice is of opinion, and I agree with him, that, strictly speaking, the creditor is entitled to have that more thoroughly investigated than appears to have been done. Of course, he must do it at his own expense, and upon that one point, and that only, the matter will stand over for the production of evidence before us. If the inquiry is not insisted on, the order of the Chief Judge will be reversed (1).

SIR G. MELLISH, L.J.:—

I am entirely of the same opinion. In *Ex parte Lewis* (2) the construction of the *Bills of Sale Act* in these matters was fully considered by the Court. I am of opinion that the proper construction was put upon it in that case, and the same construction appears to have been put upon it by the Chief Judge himself in *Ex parte Homan* (3). The distinction between real and formal possession was founded, in those cases, upon the authority of certain modern cases at law which were there fully considered. The distinction is, that if a broker is simply put in and remains in possession, so as to prevent the removal of the furniture, but allowing everything to go on just as it did before, permitting everything to be used by the debtor and his family, then the goods still remain in the apparent possession of the debtor. There must be something done which takes them plainly out of the apparent possession of the debtor in the eyes of everybody who sees them. There is no reason at all to depart from the distinction which is there laid down. The Chief Judge seems to have thought it depended on the fact that only a short time had elapsed between the time when the broker was put in possession and the time when he proceeded to sell, and to have thought that he had entered with a *bonâ fide* intention to sell; and that he brought his vans within a reasonable time. With submission to his judgment, I really think that is wholly immaterial. It is different from the "order and disposition" clause in the *Bankruptcy Act*, because there, if the true owner demands the goods, that at once prevents

(1) No application was made for an inquiry.

(2) Law Rep. 6 Ch. 626.

(3) Ibid. 10 Eq. 63.

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the "order and disposition" clause applying. But, under the *Bills of Sale Act*, if the creditor does not choose to register his bill of sale, and the goods remain in the apparent possession of the debtor, and are so at the time the act of bankruptcy is committed, it does not matter at all, in my opinion, that he has used due diligence or has endeavoured to get possession. If, in point of fact, he has not got possession, and has not taken the goods both out of the actual and out of the apparent possession of the debtor, then the *Bills of Sale Act* applies, and the trustee can come in.

Solicitors for the Appellant: Messrs. *Andrew & Wood*, for Mr. *Williams, Lincoln.*

Solicitors for the Respondent: Messrs. *Wilkins, Blyth, & Marsland.*

SALVIN *v.* NORTH BRANCEPETH COAL COMPANY.

L. JJ.
1874
June 9, 10, 11, 23, 24; *July* 14.

[1873 S. 44.]

Nuisance—Smoke—Injunction—Stoppage of Commercial Works—Damage, Extent of—Issue—Expert, Employment of, to report.

Bill by Plaintiff, seeking, on the ground of smoke nuisance, to stop a large commercial work, dismissed upon the facts with costs.

The following subjects discussed:—

1. The extent and character of the damage necessary to sustain a bill.
2. The province of scientific evidence.
3. The effect of the previous existence of similar nuisances.
4. The circumstances under which the Court will direct an issue, or send an expert to report.

Decree of the Master of the Rolls affirmed.

THE Plaintiff was tenant for life of a mansion-house and about 485 acres of land, called *Burnhall*, situated in the county of *Durham*, having in the neighbourhood and on all sides of his estate many collieries, some of which have been worked for thirty or forty years. The Defendants had, in 1870, opened or enlarged a coal pit called the *Littleburn Colliery*, 400 yards from one of the Plaintiff's plantations and 1000 yards from his mansion-house, and had erected there coke ovens increasing by degrees to the number of 254. These works, in fact, intersected the lands of the

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Plaintiff, and the Plaintiff, in February, 1873, filed the bill in this suit to restrain the Defendants from allowing any effluvia to issue from their works so as to occasion nuisance to the Plaintiff or diminish the value of his estate. The Defendants alleged that their works did no real injury to the woods or lands of the Plaintiff; and that there were already so many collieries and coke-works in the neighbourhood (the nearest being half a mile off), that the colliery and coke ovens erected by the Defendants made no perceptible addition to the smoke.

A great number of affidavits was filed on both sides, and many of the witnesses were cross-examined before the Master of the Rolls, who dismissed the bill with costs (1).

(1) 1874. March 17.

SIR G. JESSEL, M.R.:—

The Plaintiff is the owner of a mansion-house and of a valuable estate in the county of *Durham;* the Defendants are a coal company who have sunk a pit for the purpose of obtaining coal from a colliery, and have erected at or near the mouth of that pit a very large number of ovens, which they are using, in accordance with the custom of that part of the country, in making coke. The Plaintiff alleges, and the Defendants deny, that the result of those operations is to cause an emission of a considerable amount of smoke and gases, which produce a substantial injury to the Plaintiff's property situate in the neighbourhood of these works.

The real question which I have to decide—for there is no question about the law of the case—is, whether or not that allegation is proved to my satisfaction. Now the law, as I said before, is plain. Counsel on both sides have referred with equal confidence to the case of the *St. Helen's Smelting Company* v. *Tipping* (11 H. L. C. 642) as laying down the law on the subject; and I agree that a better case could not have been referred to, or one which has more bearings on the questions which I have to try. The Judge who tried the cause was Mr. Justice *Mellor*, and he told the jury that an actionable injury was one producing sensible discomfort to the person. Then he went on to say that, in an action for nuisance to property arising from noxious vapours, the injury, to be actionable, must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. He told them further, that when the jurors came to consider the facts, all the circumstances, including those of time and locality, ought to be taken into consideration; and that, with respect to the latter, it was clear that in counties where great works had been erected and carried on, persons must not stand on their extreme rights and bring actions in respect of every matter of annoyance, for if so, the business of the whole country would be seriously interfered with.

That ruling was upheld by the House of Lords, and I take it as having established, in the first place, that the injury must be visible, by which I understand visible to ordinary persons conversant with the subject-matter. I do not think that this condition is satisfied by getting a scientific man to say that, by the use of scientific appliances, micro-

The Plaintiff appealed.

Mr. *H. Mathews*, Q.C., Mr. *Edmund James*, and Mr. *Trevelyan*, for the Plaintiff.

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scopic or otherwise, he can state that there will be in future time an injury. I do not think that that would be sufficient. I take it that there must be a present injury visible to ordinary persons conversant with the subject-matter, and such an injury as would entitle a jury to give substantial as distinguished from nominal damages. I consider that to be the meaning and opinion of the learned Judge. That meaning is very much confirmed by what was said by the learned Lords in deciding that case, especially by Lord *Cranworth* and Lord *Wensleydale*.

Lord *Cranworth* says, adopting the words of Mr. Justice *Mellor*, "It must be plain that persons using a limekiln, or other works which emit noxious vapours, may not do an actionable injury to another, and that any place where such an operation is carried on so that it does occasion an actionable injury to another, is not, in the meaning of the law, a convenient place." Lord *Cranworth* then goes on to say: "I always understood that to be so; but in truth, as was observed in one of the cases by the learned Judges, it is extremely difficult to lay down any actual definition of what constitutes an injury, because it is always a question of compound facts which must be looked to, to see whether or not the mode of carrying on a business did or did not occasion so serious an injury as to interfere with the comfort of life and enjoyment of property." Therefore it must be a serious injury of some kind. Then he refers to a case of his own, and says that he thinks Mr. Justice *Mellor* could not have possibly stated the law better. Then Lord *Wensleydale* says:—[His Honour then read the judgment of Lord *Wensleydale*:—]

I do not think there is any contest between the learned counsel on both sides as to the law. They have both stated that the real question I have to try is whether a substantial injury, meaning an injury for which a jury would give substantial damages, has been inflicted on the Plaintiff.

The case of the Plaintiff may be fairly divided into two complaints. The first complaint is, an injury to personal comfort, and as to that there are two observations to be made. First of all, is the injury of such a nature as substantially to interfere with the comfort and enjoyment of the Plaintiff as owner of the mansion-house and grounds in question? Secondly, if it is so, does it come from the Defendants' works?

As regards the first point, I have no doubt whatever. As regards the second, I think it must be answered in this way, that it does not all come from the Defendants' works; and I think it does not, even as to the major part, come from the Defendants' works. I think that the state of things, so far as regards this part of the case, was not substantially altered by the Defendants' works.

[His Honour then commented on the evidence, coming to the conclusion that the quantity of black smoke from the other collieries was very considerable before the colliery in question was established, and that this colliery did not introduce a new state of things, so far as personal comfort went. And as to the injury alleged to be done to the wood by the deleterious gases emitted

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The facts of the case and the effect of the evidence are sufficiently stated in the judgments of the Master of the Rolls and the Lords Justices.

SIR W. M. JAMES, L.J.:—

In this case the Master of the Rolls has dismissed with costs the bill of the Plaintiff.

The bill, in substance, sought, by a mandatory injunction, to prevent the Defendants, who are a great colliery company, from erecting or working any coke ovens or other ovens to the nuisance of the Plaintiff, the nuisance alleged being from smoke and deleterious vapours.

The Master of the Rolls thought it right to lay down what he conceived to be the principle of law applicable to a case of this kind, which principle he found expressed in the case of *St. Helen's Smelting Company* v. *Tipping* (1), in which Mr. Justice *Mellor* gave a very elaborate charge to the jury, which was afterwards the subject of very elaborate discussion and consideration in the House of Lords. The Master of the Rolls derived from that case this principle: that in any case of this kind, where the Plaintiff was seeking to interfere with a great work carried on, so far as the work itself is concerned, in the normal and usual manner, the

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by the coke ovens in question, His Honour was of opinion that such injury was not shewn as in the *St. Helen's* case, where substantial damages were awarded. No trees had died, and the woods of the Plaintiff were in fair order; nor had the crops on the adjoining lands been injured. No doubt the ovens might have done some slight damage to the trees, but the evidence did not shew that any serious damage had been done, though the scientific botanists had said that there were signs of damage, not however visible to ordinary persons. It was admitted that some of the trees in the *Tarwell Hall Wood* did shew signs of injury, but there was no proof that this was caused by the coke ovens, or that the injury had not begun before the Defendants' works were erected.]

For these reasons, I think that the Plaintiff has not made out his case; and that, as he comes here strictly upon legal grounds to ask for an injunction upon the ground of substantial injury, the only course I can now take is to dismiss the bill, and of course the costs will follow.

(1) 11 H. L. C. 642.

Plaintiff must shew substantial, or, as the Master of the Rolls expressed it, "visible" damage. The term "visible" was very much quarrelled with before us, as not being accurate in point of law. It was stated that the word used in the judgment of the Lord Chancellor was "sensible." I do not think that there is much difference between the two expressions. When the Master of the Rolls said that the damage must be visible, it appears to me that he was quite right; and, as I understand the proposition, it amounts to this, that, although when you once establish the fact of actual substantial damage it is quite right and legitimate to have recourse to scientific evidence as to the causes of that damage, still if you are obliged to start with scientific evidence, such as the microscope of the naturalist, or the tests of the chemist, for the purposes of establishing the damage itself, that evidence will not suffice. The damage must be such as can be shewn by a plain witness to a plain common juryman.

The damage must also be substantial, and it must be, in my view, actual; that is to say, the Court has, in dealing with questions of this kind, no right to take into account contingent, prospective, or remote damage. I would illustrate this by analogy. The law does not take notice of the imperceptible accretions to a river bank or to the sea-shore, although after the lapse of years they become perfectly measurable and ascertainable; and if, in the course of nature, the thing itself is so imperceptible, so slow, and so gradual as to require a great lapse of time before the results are made palpable to the ordinary senses of mankind, the law disregards that kind of imperceptible operation. So, if it were made out that every minute a millionth of a grain of poison were absorbed by a tree, or a millionth of a grain of dust deposited upon a tree, that would not afford a ground for interfering, although after the lapse of a million minutes the grains of poison or the grains of dust could be easily detected.

It would have been wrong, as it seems to me, for this Court in the reign of *Henry* VI. to have interfered with the further use of sea coal in *London*, because it had been ascertained to their satisfaction, or predicted to their satisfaction, that by the reign of Queen *Victoria* both white and red roses would have ceased to bloom in the *Temple Gardens*. If some picturesque haven opens

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its arms to invite the commerce of the world, it is not for this Court to forbid the embrace, although the fruit of it should be the sights, and sounds, and smells of a common seaport and ship-building town, which would drive the Dryads and their masters from their ancient solitudes.

With respect to this particular property before us, I observe that the Defendants have established themselves on a peninsula which extends far into the heart of the ornamental and picturesque grounds of the Plaintiff. If, instead of erecting coke ovens at that spot, they had been minded, as apparently some persons in the neighbourhood on the other side have done, to import ironstone, and to erect smelting furnaces, forges, and mills, and had filled the whole of the peninsula with a mining and manufacturing village, with beershops and pig-styes and dog-kennels, which would have utterly destroyed the beauty and the amenity of the Plaintiff's ground, this Court could not, in my judgment, have interfered. A man to whom Providence has given an estate, under which there are veins of coal worth perhaps hundreds or thousands of pounds per acre, must take the gift with the consequences and concomitants of the mineral wealth in which he is a participant.

But in this particular case the bill itself does not allege any sentimental case, or any prospective, contingent, or remote case of nuisance. On the bill as it stood, and on the evidence in support of that bill, there was a case of absolute nuisance of startling magnitude. And on the affidavits in support of his case it really seemed to me scarcely possible to conceive that any answer or any avoidance could have been successfully made by the Defendants. But when the case on the part of the Defendants came to be heard, and when their evidence came to be read, every observed fact, and every scientific conclusion from the fact, was directly, absolutely, and completely traversed.

8 Ch. D. 572

The only thing which, to my mind, was unmistakeably established by the evidence on both sides was the utter worthlessness of affidavit evidence in such a case as this. The affidavits were before the Master of the Rolls, and were very carefully considered by him. The witnesses who were selected on each side as the proper sample witnesses for cross-examination were cross-examined before him, and to some not inconsiderable extent were cross-

examined by him; and after a hearing extending over days, and an examination very carefully conducted, the Master of the Rolls came to the conclusion that the Plaintiff had utterly failed to make out his case, and that there was no proved instance of a single tree killed or substantially injured, or of a single blade of grass burnt or destroyed. That was the conclusion to which he came upon the question of fact.

It appears to me that, whatever conclusion I myself might have arrived at if the case had come before me in the first instance, I cannot overrule a decision arrived at by the Master of the Rolls with such advantages and such opportunities. Indeed, we were scarcely pressed to overrule that decision *simpliciter*.

But we were pressed with this—that further time has now elapsed and another year has now gone, and that we might send down a scientific witness, or scientific witnesses, who should go and inspect the property and report to us, either as witnesses or as referees. To my mind that would not be a satisfactory mode of dealing with such a case as this. I am unable to find any question or questions which I could dictate to those witnesses upon which their answers would enable me to determine the case. They would not merely have to ascertain what there is, but what is the cause, and how much of one particular cause operates in combination with other causes; and, in fact, it would be giving a new trial upon new evidence, based upon the present state of things. Therefore I could not give my voice for any such attempt as that to solve the question between the parties.

In truth, I should be very loth to stop a great work of this kind where there is conflicting evidence between the parties, except upon the verdict of a jury, which jury would have had the opportunity of personally visiting and seeing the *locus in quo* and the surrounding district, and before whom witnesses would give their evidence *vivâ voce* in open Court, and with the knowledge that they were giving it to persons who had the opportunity themselves of knowing something of what they were deposing to.

Then the question presented itself whether an issue should be directed to try the question of nuisance. An issue would, however, hardly be a just or proper mode of trying the case. The bill was filed in February last year. An issue as to what was the

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state of things at the time when the Plaintiff invoked the protection of this Court could not now be satisfactorily disposed of by a jury. Of this I am satisfied, that if with the experience of the year 1873, if with the experience of the year 1874, and if with the experience of the beginning of the year 1875, the Plaintiff is able to make out that there has been a substantial wrong done to him, and that a substantial wrong is continued to be done to him, there is no danger of any mischief for which he will not be able to get ample compensation up to the time of the verdict, whether that is reckoned in scores or hundreds or thousands of pounds. If, as the result of that verdict and of the evidence adduced in that trial, it should then appear to the Court that it is a fit case to be followed up by a mandatory injunction, that mandatory injunction would be quite in time to arrest the further progress of mischief. For I am satisfied that if such an injunction were granted in the year 1875, no landscape painter or landscape gardener would, in the year 1876, be able to trace in the woods and forests of this estate the slightest evidence of the peril to which they had been in the meantime exposed.

I think the Plaintiff ought to be in the position of a man who has been nonsuited at law for want of sufficient evidence at the time. If he can make out, with new materials, or with better evidence, a better case to satisfy the Court, he is at liberty to do so. The decision of the Master of the Rolls, affirmed by us, will not prejudice the Plaintiff any more than by shewing that he had not, up to the 22nd of February, 1873, sustained sufficient damage to warrant a verdict in an action on the case, or to warrant this Court in interfering. Further than that he is not prejudiced, except, of course, that, like every other unsuccessful litigant, he has to pay the costs of his unsuccessful litigation.

I am of opinion that the decree of the Master of the Rolls ought to be affirmed, and that this appeal should be dismissed with costs.

SIR G. MELLISH, L.J. :—

There is no real difficulty as to the principles on which this Court should proceed in deciding this case.

The question to be determined is, whether the Plaintiff has

made out that in an action at law he could recover substantial damages for the nuisance alleged in the bill; and the only real difficulty is in distinguishing how much that proposition depends upon questions of fact, and how much upon questions of law. There is a difficulty in distinguishing precisely what is a question of fact from what is a question of law in these proceedings about nuisances. Indeed, when certain inferences of fact have been established by numerous cases, they become, to a great extent, very nearly of the same authority as if they were propositions of law. For instance, it is not correct to say, as a strict proposition of law, that if the Plaintiff has not sustained, or cannot prove that he has sustained, substantial damage, this Court will give no relief; because, of course, if it could be proved that the Plaintiff was certainly about to sustain very substantial damage by what the Defendant was doing, and there was no doubt about it, this Court would at once stop the Defendant, and would not wait until the substantial damage had been sustained. But in nuisance of this particular kind, it is known by experience that unless substantial damage has actually been sustained, it is impossible to be certain that substantial damage ever will be sustained, and therefore, with reference to this particular description of nuisance, it becomes practically correct to lay down the principle that, unless substantial damage is proved to have been sustained, this Court will not interfere.

These principles apply to the observation which the Master of the Rolls has made as to the damage being visible. That, as a strict proposition of law, is not correct; for if it is by evidence made out that there is substantial damage, it does not matter how the fact of damage is made out, whether by the eye or by the nose, or whether it is made out by the eye of a scientific person, or by the eye of anybody else. But, as a matter of fact, in cases of a nuisance of this particular description, unless the damage is proved to have been sustained, so that, I will not say every ignorant eye, but every fairly instructed eye can really and clearly see it—unless that is the case, it is impossible to be certain that the substantial damage has actually been sustained. Therefore, those propositions are, to my mind, perfectly accurate, and I do not think that it is material here to distinguish how much of them

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ought now to be considered as inferences of fact which the Court draws from former cases, and how much of them ought to be considered strictly as inferences of law.

On account of the great importance of this case to the parties, and on account of the great contradiction in the evidence, it was not satisfactory to my mind to decide the case without in a great measure going through the evidence. The result is, that I am persuaded that this case was thoroughly investigated in the Court below; that is to say, it was as thoroughly investigated as the defective procedure renders it possible that a case of this kind should be investigated. It is quite obvious that the Master of the Rolls, in coming to the conclusion which he did, had very great advantage over us in this Court. The witnesses were cross-examined before him. He put numerous questions to them himself, to satisfy his own mind as to the particular points on which he required to be satisfied, and no doubt he obtained that information which he particularly wanted. We have not had that advantage. If such a decision amounted to what in a Court of law would be called a verdict against the weight of evidence, we ought to interfere, but I think that great weight must, in cases of this kind, be given to the decision of the Court below; and unless we can see plainly that there was a wrong inference drawn on a point of fact, we ought not to interfere with the decision. Having read through all the evidence, I cannot say that on the evidence as it stands I differ from the conclusion that the Master of the Rolls came to. [His Lordship then commented on the evidence, and continued:—] Therefore, I have no doubt that it is impossible on this evidence, as it stands, to do anything else than affirm the judgment of the Master of the Rolls.

One question on which I did certainly at the close of the argument entertain a doubt was, whether it was our duty to have this case further investigated, or to affirm the judgment of the Master of the Rolls. Now, it would have been very difficult for us to have sent down any persons, on whose opinion we could satisfactorily have relied, to examine the state of the woods. We should practically, if we had done that, have been giving up our judgment to their judgment, for after having done that, it would have been very difficult for us to differ from what they had said.

Then I considered—and that is what I had more doubt about—whether it was our duty to order an issue to be tried at *Durham*. But I have come to the conclusion that that is not our duty. In the first place, the Plaintiff at the outset had the choice of the tribunal which he would select. He could have brought his action at law, and have tried it by a jury of the county of *Durham*, or he could bring his suit in this Court. He chose to bring his suit in this Court, and in my opinion it is very important for us to see, though of course we must administer equal justice to both parties, that Plaintiffs do not get the power of stopping very important commercial works by proceedings in this Court when they have not got a case which they could practically present to a jury.

Then it is impossible not to be influenced by this consideration, that an enormous expense has been incurred by the trial in this Court, and by bringing up the witnesses to *London*. The Master of the Rolls has properly come to the conclusion, on the evidence as it stands, that the Plaintiff has not made out his case, and has therefore dismissed the bill. Would it be just and right, if that is the state of the evidence on the case as it stands, that we should begin a totally new investigation at an enormous expense to the Defendants, who have simply been brought here by the Plaintiff, and who can say that it is not their fault that there has been no trial by a jury? It appears to me that it would be unjust to the Defendants to order that there should be an issue tried in this suit, particularly when we consider that the case is not finally decided. If real damage is continuously sustained, and is made plain and manifest so that no one who sees the woods can doubt it—if that case does occur—the Plaintiff will not be without his remedy. He may still bring his action, and, in my opinion, he may bring his action in time to stop any very real and serious damage to his property.

On the whole, therefore, I am of opinion that the judgment of the Master of the Rolls must be affirmed and the appeal dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Ward, Mills, & Witham.*

Solicitor for the Defendants: Mr. *W. Ford,* agent for Mr. *J. Proud, Bishop Auckland.*

L. JJ.
1874
July 10, 24.

Ex parte TINKER. *In re* FRANCE.

Liquidation by Arrangement—Resolution of Creditors to sell all the Estate for a fixed sum—Refusal of Creditors to grant Discharge—Injunction to restrain Proceedings against after-acquired Property of Debtor.

10 Ch. 261, 259
4 Ch. D. 535.
19 Ch. D. 140
143-4-8
153-4

The creditors of a manufacturer resolved on a liquidation by arrangement, and appointed a trustee and a committee of inspection. They afterwards passed a resolution accepting an offer by the debtor and *B.*, a friend of his, to purchase "the whole of the debtor's estate and effects" for £6000, towards which the debtor was to contribute £200, payable by instalments. A deed was executed conveying the machinery, stock-in-trade, &c., and all other property then vested in the trustee under the liquidation, or which he had power to dispose of, to *B.* *B.* took the debtor into partnership in the business, and the instalments were all duly paid. The debtor then applied for his discharge, but a meeting of the creditors, summoned to consider the question, refused to grant it:—

Held (affirming the decision of the Chief Judge in Bankruptcy), that the sale included all the future property of the debtor, and that the debtor was entitled to an injunction restraining the committee of inspection and other creditors from taking proceedings against property acquired by him since the commencement of the liquidation.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

On the 1st of February, 1873, *J. W. France*, a woollen-cloth manufacturer, filed a liquidation petition. At the first meeting of the creditors, held on the 19th of February, a liquidation by arrangement was resolved upon, and a trustee and a committee of inspection were appointed. On the 13th of March another meeting of the creditors was held, at which the following resolutions were passed by the proper statutory majority:

"That the trustee shall accept the offer made by Mr. *Joseph Blackburn*, *James Robinson*, and the above-named debtor (the said *James Robinson* merely guaranteeing the payment of £200 for the last instalment to be paid as hereinafter mentioned), to purchase the whole of the debtor's estate and effects for the sum of £6000, and that such sum shall be paid by instalments in four, eight, and twelve months from the 7th of February, 1873;" the payments to be secured in the manner mentioned in the resolution. This resolution was registered on the 14th of March. On the same

day an agreement was entered into between *Tinker*, the trustee, of the first part, *Blackburn* of the second part, *Robinson* of the third part, and the debtor of the fourth part, whereby it was witnessed that in pursuance of the above-mentioned resolution of the creditors, *Tinker*, as trustee, agreed to sell to *Blackburn*, in consideration of the sum of £5600 paid by him, and of £200 paid by *Robinson*, and of £200 paid by the debtor (such three several sums being payable as thereinafter mentioned), and *Blackburn* agreed to purchase "All the machinery now in and about the mills occupied by the said *J. W. France*, and all the stock-in-trade, live and dead farming stock, money, book-debts, business, and household furniture, utensils and effects, and all reversionary and contingent interests, benefit of guarantees and all other property, estate, right or interest whatsoever, now passed to the said trustee under the proceedings aforesaid, or which he has in any way power to dispose of, subject nevertheless as to such goods as are in the hands of the creditors to any legal lien they may have thereon." The agreement then provided how the instalments of the purchase-money were to be paid and secured.

On the 18th of April, 1873, a deed between the same parties was executed to carry out the agreement for sale, and by this deed *Tinker*, as trustee, granted and transferred to *Blackburn*, in consideration of the sum of £6000, the property mentioned in the agreement by the same words of description.

Immediately after the execution of this deed *Blackburn* took the debtor into partnership with him in the business. The whole of the £6000 was duly paid, and the debtor's solicitors then applied to the trustee to summon a meeting of the creditors to consider the question of granting the debtor his discharge, which had not been previously done. On the 25th of February, 1874, the trustee issued a notice summoning a meeting of the creditors on the 6th of March, "for the purpose of considering the propriety of granting to the debtor his order of discharge, the release of the trustee, and the closing of the liquidation." At this meeting a resolution granting the debtor an unconditional discharge was proposed, but it was not carried by the necessary statutory majority; and consequently when the resolution was taken in for registration the

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Registrar of the *Huddersfield* County Court, in which the proceedings were instituted, refused to register it.

On the 6th of May, 1874, the debtor applied to the Court for an order confirming the arrangement entered into, and "declaring that such arrangement was accepted by the creditors of the debtor in full satisfaction and discharge of all their claims upon the debtor and upon his estate," and for an order confirming the indenture of the 18th of April, 1873, and for an order declaring the effect of the resolution referred to in that indenture to be the acceptance of the purchase-money therein mentioned in satisfaction and discharge of all claims which the creditors of the debtor then had upon him or upon his estate, and for an order restraining the members of the committee of inspection and certain other creditors named, "from taking any further proceedings against the debtor for the purpose of recovering any further sum from him in respect of his liability, or of his estate or effects, beyond the amount of the composition or dividend which the above mentioned purchase-money will realize."

Upon this application the Registrar made this order: "The Court doth find and declare that the effect of the arrangement in the above-mentioned resolution and deed was to vest in the purchaser from the trustee all such property as was then vested in the trustee at the commencement of the liquidation or which might devolve upon him during its continuance; and it appearing to the Court that the members of the committee of inspection and their respective firms claimed to be entitled to the profits made by the above-named debtor in the business sold by them as aforesaid, and to such profits and property as the debtor might thereafter acquire until he obtained his order of discharge, the Court doth hereby restrain" the members of the committee of inspection, their respective firms, and some other creditors (naming them), "from seizing, acquiring, or in any way interfering with the profits now made or hereafter to be made by the said *Joseph Blackburn* or *J. W. France*, in connection with the business purchased from the above-mentioned trustee, or the profits to be acquired therefrom by the said *J. W. France*, and that they the said creditors, having proved their debts upon the estate, be restrained from commencing,

continuing, or enforcing any proceedings whatsoever against the debtor or his property in respect of their said debts."

The trustee and the creditors who were restrained appealed from this order to the Chief Judge, who affirmed the order of the Registrar; and they again appealed from his decision.

There was evidence on both sides as to what was the understanding when the arrangement for the sale of the estate was entered into. On the one side it was said that the creditors intended to insist on receiving 10*s.* in the pound on their debts; on the other side, that it was understood that the debtor should be free from all liability, and should have his discharge if the arrangement was duly carried out.

Mr. *De Gex*, Q.C., and Mr. *Jordan*, for the Appellants:—

The *Bankruptcy Act*, 1869, provides, by sect. 125, sub-sect. 9, that in a liquidation the discharge of the debtor "may be granted by a special resolution of the creditors in general meeting . . . . upon such terms and conditions as the creditors think fit." The Court has no jurisdiction to make an order which is equivalent to an order of discharge, when the creditors have not thought fit to pass such a resolution: *Ex parte Pooley* (1). On the true construction of the arrangement for purchase of the estate, the after-acquired property of the debtor is not included: *Ex parte Piercy* (2); *In re Vizard's Trusts* (3). The creditors have no intention of taking the debtor's profits acquired in the business, and there is no evidence that they have threatened to do so; but they never intended to give up to him all property which might afterwards come to him from any source.

Mr. *Roxburgh*, Q.C., and Mr. *J. Beaumont*, for the Respondents, were not called upon.

SIR W. M. JAMES, L.J.:—

The contention of the Appellants is really against good faith and common honesty. They have sold to the debtor and his friends the business, from which it was expected that the debtor

(1) Law Rep. 5 Ch. 722. (2) Law Rep. 9 Ch. 33.
(3) Law Rep. 1 Ch. 588.

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should derive profit, and they now want to take the profits away from him. The meaning of the resolution is clear. It was to the effect that "the whole of the debtor's estate and effects" should be sold to the debtor and another person. These words must include the future estate of the debtor from the very nature of the transaction, inasmuch as they must include the profits of the business to which the trustee looked for the payment of the instalments. It would be absurd to suppose it was intended that they should be able to come down upon him at any moment and seize all his property. I am of opinion that the decision of the Chief Judge was quite right, and the appeal must be dismissed with costs.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

Solicitors for the Appellants: Messrs. *Shum, Crossman, & Crossman*, agents for Messrs. *John Sykes & Son, Huddersfield.*

Solicitors for the Debtor: Messrs. *Learoyd, Learoyd, & Peace*, agents for Messrs. *Learoyd & Learoyd, Huddersfield.*

L. JJ. 1874 *July* 25.

In re BERKLEY (A LUNATIC). BERKLEY *v.* BERKLEY.

[1871 B. 254.]

Appointment of New Trustee—Female Trustee.

The Court appointed an unmarried lady, aged 27, who was a relation of the *cestuis que trust* under a will, to be a trustee, there being a difficulty in finding any other suitable person to accept the office.

THIS was a Petition for the appointment of a new trustee, and for a vesting order.

John Berkley, who died in 1862, devised and bequeathed his real and personal estate to four trustees, upon trust to sell and convert, and to invest the proceeds and stand possessed of the funds upon certain trusts for the benefit of his wife and children.

The trustees and executors were the widow, *Louisa Berkley*,

George Berkley, *G. L. Clowser*, and *George Wythes*. The will was proved by the first three; *Wythes* neither proved nor acted.

In 1871, a bill was filed on behalf of the testator's children, all of whom were infants, for carring into effect the trusts of the will, and a decree was made in November, 1872, directing, among other things, the appointment of a new trustee in the place of *Wythes*. This direction was never carried into effect.

On the 2nd of June, 1873, *Louisa Berkley* was found lunatic, and by an order in the lunacy and in the cause, dated the 10th of September, 1873, *G. M. Arnold* was appointed trustee in the place of *Louisa Berkley*, jointly with *Clowser* and *George Berkley*, and the right to transfer various stocks and shares held upon the trusts of the will, and to receive the interest and dividends due thereon, was vested in *G. Berkley*, *Clowser*, and *Arnold*.

Clowser died in April, 1874, and the Petition asked that Miss *Barton*, a niece of the testator, aged 27, should be appointed a trustee in his place, it being alleged that no other suitable person could be found who was willing to undertake the office.

Part of the property consisted of 150 £5 shares in an insurance company, on which 5*s*. per share only had been paid up. The company was one with unlimited liability. The Petition, which was presented by the lunatic by her committee and by *George Berkley* and *Arnold*, asked that these shares might be sold, and that the right to transfer them might be vested in *G. Berkley* alone, he undertaking to invest the proceeds in the names of the continuing trustees and the new trustee, and that the other property subject to the trusts of the will might be vested in the continuing trustees and the new trustee.

Mr. *W. W. Karslake*, for the Petitioners, referred to *In re Campbell's Trust* (1).

Mr. *Hanson*, for the Plaintiffs.

THEIR LORDSHIPS made the order.

Solicitors: Mr. *Thomas Sismey*; Messrs. *Paterson, Snow, & Burney*.

(1) 31 Beav. 176.

L. JJ.
1874
July 31.

Ex parte HOLTHAUSEN. *In re* SCHEIBLER.

Bankruptcy—Creditor holding Security—Deposit of English Title Deeds with German Firm—Lex Loci Contractus—Personal Contract enforcible against Trustee.

10 Ch D 616
46 L.D. 570

S. & Co., who were merchants in *London* and *Shanghai*, applied to the Appellants, who were merchants in *Prussia*, to open a credit on their behalf for £5000, and offered to deposit with them as a security the title-deeds of a house at *Shanghai*. The negotiation was commenced verbally, when all parties were in *Prussia*, but was concluded, after some correspondence, by a letter written by *S. & Co.* to the Appellants from *London*, inclosing the title-deeds of the house at *Shanghai*. The Appellants accordingly accepted bills drawn by *S. & Co.* and payable in *London*. *S. & Co.* shortly afterwards became liquidating debtors, a considerable sum being then due to the Appellants on the bills. No conveyance or memorandum of the deposit was made at the British Consulate at *Shanghai*, but the house remained registered in the name of *S. & Co.* The Appellants accordingly applied for an order that the trustee in liquidation should convey the house to them. Evidence was adduced that, according to the law of *Prussia*, the contract was binding personally on *S. & Co.*, but that, as the necessary formalities for perfecting the security at *Shanghai* had not been gone through, the Appellants had no mortgage or lien on the house:—

Held, by *Mellish*, L.J., that the contract must be governed by English law, and that the Appellants had a good security on the house by the deposit of the deeds:

Held, by both the Lords Justices, that whether the contract was governed by English or by Prussian law, the contract was personally binding on *S. & Co.*, and could be enforced against their trustee in liquidation; and the Court made an order to sell the house and pay the proceeds to the Appellants.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, sitting as Chief Judge in Bankruptcy.

Messrs. *Holthausen, Smidt, & Co.* (the Appellants) were merchants at *Crefeld*, in *Prussia*. Messrs. *Scheibler, Matthaei, & Co.* were merchants carrying on business in *London* and at *Shanghai*, in *China*.

On the 17th of September, 1872, a negotiation took place between *Holthausen & Co.* and the members of the firm of *Scheibler & Co.*, who were then at *Crefeld*, respecting the opening of a credit for £5000 in favour of the last-mentioned firm. On that day *Holthausen & Co.* wrote a letter to *Scheibler & Co.*, of which the following is a translation:—

"*Crefeld*, 17th Sept., 1872.

"In continuance of the interview had with us, we are quite willing to open you a credit of £5000 sterling against your depositing the title-deeds of the house at *Shanghai*, of which amount you can dispose by drafts from *Shanghai* at six months' sight, and which drafts are to be covered before maturity. For these transactions we shall charge you with a commission at the rate of 1 per cent.

"With esteem,

"*Holthausen, Smidt & Co.*"

The house referred to in this letter belonged to *Scheibler & Co.*, and was registered in their names at the British Consulate at *Shanghai*.

On the 28th of September, *Scheibler & Co.* wrote a letter from *London* to *Holthausen & Co.*, of which the following is a translation:—

"31, *New Broad Street, London*, Sept. 28, 1872.

"We beg to refer to our respects of yesterday, and to-day confirm the receipt of your favour of the 17th instant. Referring to the contents of the same, we beg to ask you by this letter whether it is agreeable to you if we now make use of the credit kindly opened for us at three months. Further drawings will be effected from *Shanghai*.

"With high esteem,

"*Scheibler, Matthaei, & Co.*"

Holthausen & Co. replied to this letter by a letter dated the 30th of September in the following terms:—

"*Crefeld*, 30th Sept., 1872.

"Crossing our respects of yesterday, we received your favour of the 28th instant, and, in reply, we agree to your making use of the credit opened to you at three months' date, after having sent the title-deeds: self-evidently, we expect remittance before maturity.

"With esteem,

"*Holthausen, Smidt, & Co.*"

On the 30th of October, *Scheibler & Co.* sent the title-deeds of the house at *Shanghai* to *Holthausen & Co.*, with a letter, of which the following is a translation:—

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"*London,* 30th October, 1872.

"We hereby hand you the title-deeds of our house and land at *Shanghai,* and the fire insurance policies of the same, and hereby declare that we pledge the possession of the house and land therein described with you as security for the 10 bills of exchange drawn by us on you this day to the amount of thalers 34,000 (in words thirty-four thousand thalers), Prussian currency, as well as security for the bills of renewal to be drawn subsequently; and we and our heirs and successors bind ourselves to cause the necessary entries of your right of mortgage to be made in the Land Register of the competent Consulate at *Shanghai* according to the law of mortgage, and to execute the same in due form as soon as you require us to do so during the period of these transactions. We further bind ourselves to bear all legal expenses which may be incurred by the eventual entry of your right of mortgage in the register.

"*Scheibler, Matthaei, & Co.*"

On the 2nd of November, *Holthausen & Co.* acknowledged the receipt of the letter and the title-deeds, and *Scheibler & Co.* proceeded to draw bills, which were accepted by *Holthausen & Co.,* payable in *London,* under their undertaking.

On the 6th of August, 1873, *Scheibler & Co.* presented a petition for liquidation, and a trustee was appointed. In the list of creditors they gave in the name of *Holthausen & Co.* as creditors for £11,239, and as holding as security certain silk goods and the house at *Shanghai.*

Holthausen & Co. applied to the Registrar for an order directing the trustee to cause the house at *Shanghai* to be assigned and transferred to them, and registered in their names in the proper Consulate at *Shanghai.*

The opinion of Mr. *Franken,* a German advocate, was obtained upon the effect of the deposit of deeds under the circumstances above stated according to the law of *Prussia.* The result of his opinion was that the simple deposit of the title-deeds, not having been registered at *Shanghai,* gave no right whatever to the property itself, and would give the recipient of the letter no "deducible preferential right in respect of any transferred valuable sub-mortgage or security," and must remain without effect so far as

the other creditors of *Scheibler & Co.* were concerned. But he was of opinion that it was personally binding on *Scheibler & Co.*, who could not demand to have the title-deeds returned until they had quite paid off the debt to *Holthausen & Co.* His opinion concluded as follows:—"Everything considered, I am of opinion that *Holthausen & Co.* are justified in retaining and in considering as "hand security" the acquired title-deeds received by them from *Scheibler & Co.*, but that they can receive very little from the same, inasmuch as they have no sub-mortgage or prior right in respect of the ground property itself."

Under these circumstances the Registrar refused to make the order, being of opinion that as, according to the Prussian law, *Holthausen* had no lien on the house at *Shanghai*, the English Court could not give them any assistance to obtain possession of the house.

Holthausen & Co. appealed from this decision.

Mr. *J. Pearson*, Q.C., and Mr. *Latham*, for the Appellants:—

This is an English contract, and must be regulated by English law. It is true that the negotiation was begun in *Prussia*, but the contract was concluded in *England* by the letter of the 28th of September, 1872, and the deposit was actually made in *England* by the letter of the 30th of October, for the security was complete when that letter was posted. Moreover, the bills, though accepted in *Prussia*, were drawn in *England*, and were payable here. The whole transaction, therefore, must be governed by English law: *Ex parte Pollard* (1); *Snaith* v. *Mingay* (2); *Russell* v. *Russell* (3). The creditors, therefore, have a good charge upon the debtors' house, and they are entitled to enforce it against the trustee. The late case of *Coote* v. *Jecks* (4) is precisely in point.

Mr. *Winslow*, Q.C., and Mr. *W. F. Robinson*, for the trustee:—

The contract was made in *Germany*, and must be regulated by German law. The final acceptance of the offer was made in *Prussia* by the letter of the 30th of September, 1872, and the

(1) 1 Mont. & Ch. 239.
(2) 1 M. & S. 87.
(3) 1 W. & T. L. C. 3rd Ed. 603.
(4) Law Rep. 13 Eq. 597.

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bills drawn were accepted in *Prussia*. It therefore made no difference that the deposit of deeds was made in *England;* it was only a step in carrying out the contract. It is also clear that all parties intended the contract to be according to German law. They were all natives of *Germany* and carried on the correspondence in German, although the debtors, for the convenience of their business, resided in *London;* and the intention of the parties regulates the law of the contract, whatever the place may be where it is concluded: *Albion Insurance Company* v. *Mills* (1); *Gibson* v. *Overbury* (2); *Green* v. *Ingham* (3). If the contract is to be regulated according to German law, it is clear from the opinion of the German advocate that no relief can be obtained against the trustee, whatever personal remedy the Appellants may have had against the debtors before the insolvency.

SIR W. M. JAMES, L.J.:—

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It appears to me that for the purpose of deciding this case it is wholly immaterial whether the contract is a German contract or an English contract, or whether it is to be determined by German law or by English law, except as to one particular which I shall refer to, as to the English law of bankruptcy. We are dealing with the law of bankruptcy as it is administered in this Court with regard to an English bankruptcy, irrespective of the law of any foreign country; and the law of *England* is, that, with certain exceptions, the trustee in bankruptcy is bound by all the equities which affect a bankrupt or a liquidating debtor; that is to say, if a bankrupt or a liquidating debtor, under circumstances which are not impeachable under any particular provision connected with his bankruptcy or insolvency, enters into a contract with respect to his real estate for a valuable consideration, that contract binds his trustee in bankruptcy as much as it binds himself. It therefore appears to me that if these debtors are bound their trustee is also bound; and there is no suggestion whatever that, according to either the German law or anything known to the English law, if a man enters into a contract for valuable consideration that he

(1) 3 Wils. & Shaw Sc. App. 218. (2) 7 M. & W. 555.
(3) Law Rep. 2 C. P. 525.

will convey and assign certain property and will do all necessary acts for conveying it, he could not be compelled, being solvent, to complete the contract according to the terms of it. The German lawyer does not suggest anything to the contrary, and I myself do not believe that there is any law in any civilised country in the world which says that any party to such a contract, properly evidenced, is not bound by it. If that is so, the debtors were personally bound by the contract at the moment when their liquidation commenced. They ought to have fulfilled it; and that a bill could have been filed against them in this country to have compelled them to fulfil that contract, is beyond all question. In this country, in an English bankruptcy the trustee stands exactly in the same position as the bankrupt himself stands in, and therefore his trustee is bound to perform the contract in exactly the same way as he himself was bound to perform it.

I am, therefore, of opinion that the creditors moving are entitled to have the benefit of the security. It is suggested by Mr. *Winslow* that the property ought to be sold and the proceeds given to the Appellants; and I think that would be the right thing to do.

SIR G. MELLISH, L.J.:—

I am also of opinion that the applicants in this case are entitled to the security they claim, and I think they are entitled to it on both grounds. I think, in the first place, that this contract is to be construed according to the English law; and, secondly, even if it is to be construed according to German law, I think it is made out that it is personally binding upon the person who made it according to the German law; and if it is personally binding, then this Court, exercising the English law of bankruptcy where the bankruptcy takes place, will say that that which is personally binding upon the debtor is also binding upon his trustee.

Now, in my opinion this contract is to be construed according to the English law, for this reason: It is perfectly true that it is made by letters which passed between parties in *Germany* and parties in *London;* but the object of the letters is that the parties who carry on business in *London* may give a valid security to the

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parties who carry on business in *Germany;* and the security which is proposed to be given is a deposit of a lease of property not in *Germany,* but of property in *Shanghai.* Now a security by way of deposit of title-deeds is a perfectly well-known security according to English law, and when a man carrying on business in *London* offers to give a security well known to the English law and according to the forms of the English law, it appears to me that it would be in the highest degree unjust to resort to a foreign law for the purpose of making the security bad, because the foreign law is ignorant of any such security, and when nobody can tell exactly what the effect of the security would be according to the foreign law. Therefore I think this case can fairly be decided upon this ground, that, looking at the nature of the security that was given, and looking at the letter of the 30th of October, 1872, by which the deeds were deposited, and which was written in *London* and posted in *London,* this ought to be construed to be an English security.

But, supposing that is not so, I also agree in the ground that has been taken by the Lord Justice, that this contract was personally binding upon those who signed the agreement to deposit the deeds, and who signed it as a personal contract. It is binding upon them; and I think the rule of law is, that as it is personally binding upon them, it should be carried out as against their trustee after they have become bankrupts or liquidating debtors.

Solicitors for the Appellants: Messrs. *Freshfields & Williams.*

Solicitors for the Respondents: Messrs. *Hollams, Son, & Coward.*

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[1868 W. 132.]

Lease—Assignment—Consent—Under-lease—Covenant against Assignment—License.

The lease of certain mines contained a covenant that the lessee should not, without the consent of the lessor, let or assign the mines. The lessor granted to the lessee a license to sub-let a part, but the license provided that this should not authorize any further letting or assigning of the part of the mines, the subject of the license, without such consent as was required by the lease. The lessee then agreed to sub-let to an under-lessee the part of the mines the subject of the license, the under-lease to contain provisions in all respects like those in the original lease:—

Semble, that neither under the lease nor under the license would the under-lessee be prevented from letting or assigning without the consent of the original lessor:—

Held, that according to the agreement the under-lease ought to contain a covenant by the under-lessee against letting or assigning without the consent of the lessee, and not a covenant against letting or assigning without the consent of the lessor.

Order of *Bacon*, V.C., reversed.

BY an indenture of lease dated the 20th of April, 1861, Viscount *Sidmouth* demised unto *H. H. Williamson*, his executors, administrators, and assigns (therein called the lessee or lessees), certain mines of coal and ironstone for a term of forty years from the 29th of September, 1860. The lease contained a proviso that if the rents or compensations, or any part thereof respectively, should have been unpaid for sixty days after the days of payment; "or if the lessee or lessees, or any of them, shall at any time or times thereafter during the said term set, let, or part with possession of the said premises hereby demised, or any part or parts thereof, or transfer these presents for all or any part of the term hereby granted to any person or persons whomsoever, without the consent in writing of the said Lord *Sidmouth*, his heirs or assigns, for that purpose first had and obtained, save and except to a wife, child or children, or to a partner or partners," or in case the lessee or lessees should be adjudged bankrupt, &c., "then, and in any of the said cases, it shall and may be lawful for the said Viscount

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Sidmouth, his heirs or assigns, to re-enter upon the demised premises and take possession thereof, and also to work and win and get the mines and minerals thereby demised, and sell and convert the same to and for his, her, or their own use and benefit, and from thenceforth the term of forty years, and all right and interest thereby granted or demised, or intended so to be, and every clause, covenant, and agreement therein contained should cease, determine, and be absolutely void to all intents and purposes whatsoever, except for the purpose of recovering arrears of rent and compensation for any breach of the covenants, provisions, or agreements therein contained." The lease also contained a corresponding covenant by *H. H. Williamson*, the lessee, not during the said term to set, let, or part with the possession of the said premises, except as aforesaid, without the license or consent of the said Viscount *Sidmouth*, his heirs or assigns, in writing.

On the 17th of June, 1871, Lord *Sidmouth* granted to *J. H. Williamson* (the executor of *H. H. Williamson*, who was then dead,) a license to under-let to *George Baddeley* certain parts of the property comprised in the lease, for any term of years short of the whole term created by the lease, but it was declared by the license that it should not authorize any further letting or assigning or other parting with the possession of the lands thereby licensed to be sub-let, or any part thereof, without such consent as was required by the lease with respect to assigning and underletting of the lands thereby leased.

On the 21st of July, 1871, *J. H. Williamson* agreed to grant to *George Baddeley* an under-lease of the mines comprised in the license, for the term of twenty-nine years and a half from the 23rd of March, 1871, at the rents and royalties therein mentioned, with a proviso—

"That in such under-lease shall be contained the like provisions, conditions, and stipulations, in all respects, as are contained in the said recited indenture of lease, except the covenant on the part of the lessee to leave a barrier between the mines thereby demised and the mines under the adjoining lands."

J. H. Williamson afterwards, with the consent of Lord *Sidmouth*, sold his interest under the original lease to the *Chatterley Iron Company*.

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A dispute arose between the *Chatterley Iron Company* and *Baddeley* as to the frame of *Baddeley's* under-lease under his agreement. *Baddeley* proposed to have a covenant that he would not under-let without the consent of Lord *Sidmouth;* the company maintained that under the agreement there ought to be a covenant by *Baddeley* not to under-let without the consent of the company.

It appeared that *Baddeley* had agreed to assign his sub-lease, and had obtained the consent of Lord *Sidmouth* to the assignment.

The question as to the frame of the under-lease came before the Court under a summons in the suit of *Williamson* v. *Williamson,* which had been instituted for the administration of the estate of *H. H. Williamson;* and the Vice-Chancellor *Bacon* held the covenant ought to be that *Baddeley* would not under-let without the consent of Lord *Sidmouth;* as reported (1).

The *Chatterley Iron Company* appealed.

Mr. *Eddis,* Q.C., Mr. *Chitty,* Q.C. (Mr. *Whitehead* with them), for the *Chatterley Iron Company*:—

We say that we must be able to control our own lessees, otherwise they may assign to a pauper or to some most obnoxious person. It is clearly the meaning of our agreement that the sub-lease is to be in the same form as the lease, the names of the parties only being changed. That is the settled practice: *Jarm.* Byth. (2); *Dav.* Prec. (3).

Mr. *Joshua Williams,* Q.C., Mr. *Kay,* Q.C. (Mr. *Whitehorne* with them), for Mr. *Baddeley*:—

None of the precedent books say that such a covenant is usual, and of course the precedents only apply to the particular case. Such covenants are very onerous, and will be construed strictly: *Church* v. *Brown* (4). There was no intention to import into the under-lease more than enough to prevent the forfeiture of the original lease. Lord *Sidmouth* must be entitled to have a responsible tenant, or else the under-lessees can at once assign to any

(1) Law Rep. 17 Eq. 549.
(2) Vol. iv. p. 573.
(3) Vol. v. p. 176.
(4) 15 Ves. 258, 265.

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one. The under-lessees are not to be subject to the double control of the *Chatterley Iron Company* and of Lord *Sidmouth*. Supposing that the person whose consent was required had not been Lord *Sidmouth*, but some other person, how would it have then been?

Mr. *Batten*, Mr. *Everitt*, and Mr. *E. R. Cook*, for other parties.

SIR W. M. JAMES, L.J.:—

I am unable to concur in the judgment which the Vice-Chancellor has pronounced in this matter.

The Vice-Chancellor appears to me to have fallen into an error in considering that Lord *Sidmouth*, after he has once granted a license, has anything whatever to do with this under-lease. It is very true this under-lease could not have been made without Lord *Sidmouth's* consent; but Lord *Sidmouth* did give his consent in writing to the granting of the under-lease, adding that the license was not to authorize any further dealings; that is to say, that nobody could rely on the license as authorizing anything else to be done with the property. That of course leaves the parties entirely on their rights, independently of that license. It is said that the words of the license meant that the under-lessee was not to deal with the property without Lord *Sidmouth's* further license. There are no such words in the license, and there is nothing to my mind from which any such meaning can be extracted from the license. It says simply this, "I have granted that license to do something, it shall not authorize you to do anything else."

But, independently of that license, how does the matter stand with regard to the under-lessee? I am clearly of opinion that the under-lessee is in no way bound by the original stipulations as to assignment in the lease. The words are, that the lessee, his executors, administrators, or assigns (the words lessee or lessees imply executors, administrators, or assigns), shall not do a certain thing. Beyond all question, that is a bargain between the lessor and the lessee, and does not extend to anything affecting the estate of the under-lessee, between whom and the original lessor there is no privity whatever. There is no privity of contract and no right. That being so, Lord *Sidmouth* has nothing whatever to do, as it seems to me, with the under-lessee, and nothing, there-

fore, it appears to me, can be imported into the consideration of this question arising from any supposed necessity of protecting Lord *Sidmouth's* interests or making the agreement as if it were a tripartite agreement between the lessor and the lessee and Lord *Sidmouth*. I can see no ground for introducing Lord *Sidmouth* into the transaction after he has once granted the license and that license has authorized that which is proposed to be done.

This being so, we have an agreement between a man who has property to let and a man who is minded to take that property on lease. It is utterly immaterial that the man who has the property to let is himself only a lessee for a term. Upon the construction of the agreement it appears to me that the agreement on the under-lease is to be considered exactly in the same way as if, instead of being an agreement between a lessee and an under-lessee, it had been an agreement between Lord *Sidmouth* in respect of some adjoining property and some new person who has taken that adjoining property, as to which he has said, "I will let you the property upon such and such terms, and the lease shall contain exactly the same provisions, conditions, and stipulations as are contained in the lease which I have granted to Mr. *Williamson*." To my mind there could be no doubt in a case of that kind that every covenant was to be introduced exactly, transcribing them from one to another, merely changing the names so as to introduce the proper lessor and the proper lessee.

In this case, there being a lease from the superior landlord to the lessee, the lessee says, "I will grant you an under-lease; you have seen my original lease; we will have no quarrel about what are usual or proper clauses; there is a thing in writing—an existing lease—and my bargain with you is that that which is contained in that existing lease shall be contained in the lease I propose to grant to you." It is just the same as if they had taken any other lease between any other two persons in the world, and said, "That is the form of the lease which is to bind us." This is not a question of doubt or of ambiguity; there is no agreement which we are not to strain, or upon which we are to put a liberal interpretation in favour of one party or the other; but the proviso is plain, bare, and unambiguous, that the one written document is to be the model from which the other written

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document is to be copied, with the proper alteration of names, dates, and sums. This proviso is exactly on the same footing as the proviso for re-entry for breach of contract, or the clauses about rendering accounts or permitting visits to the mines, or all the other numerous clauses which are found in a mining lease; and we cannot legitimately or properly be influenced in our own view as to what is the construction of a written document by the fact that some of the parties may have got themselves into some complication or difficulty because they have been acting on a different view of the proper construction of the document.

I am of opinion that the order of the Vice-Chancellor ought to be reversed, and that the proviso and the covenant against alienation ought to stand with the name of the *Chatterley Iron Company*, and not the name of Lord *Sidmouth* as the person to give his consent.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

I think that according to the true construction of the original lease by Lord *Sidmouth* to *Williamson*, no right of re-entry is given to Lord *Sidmouth* in the event of an under-lessee of *Williamson*, when a proper license has been given, selling or transferring his under-lease.

The lease first demises the premises to *Williamson*, his executors, administrators, and assigns, to be thereinafter called the lessee or lessees, so that the words "lessee or lessees" throughout the lease are to include *Williamson*, his executors, administrators, and assigns, and then the proviso for re-entry is:—[His Lordship then read it.] Now the proviso for re-entry on assignment has always been strictly construed by Courts of Law, and cannot be carried beyond the plain terms of the proviso itself. Here the proviso for re-entry as applicable to this subject is, if the lessee or lessees, that is to say, if *Williamson*, his executors, administrators, or assigns, shall part with the premises, or any part thereof, to any other person or persons, but it does not say, "if the under-lessee who may claim under such lessee shall part with them;" and, in my opinion, that restriction cannot, by construction, be made to extend to any under-lessee.

That seems to me to be confirmed by this, that all the subsequent words clearly apply only to the lessee and lessees, and not to the under-lessee and under-lessees. For instance, the exception as to a wife, child or children, or partner or partners. That plainly means a wife, child or children, or partner or partners of the original lessee or of his assigns, that is to say, *Williamson*, his executors, administrators, or assigns, and never would be construed to apply to the under-lessee. So also the provision about bankruptcy does not apply to an under-lessee. I am of opinion, therefore, that there is no forfeiture by an under-lessee parting with the property without the consent of Lord *Sidmouth*.

Then that being so, the license must clearly be construed with reference to the lease. Even if the license had professed to do so, it could not have given a right of re-entry not given by the original lease; but I do not think that it even professes to do so. The license is not to be extended beyond what it expressly states. It is not a license for the particular term granted, but for any term; and for aught that appears, it might have been a short term or long term, or it might have been forfeited or surrendered, and a question might have arisen whether the lessees could then make another under-lease.

That being the construction of the lease and of the license, it appears to me that there is no difficulty at all in construing the particular clause in the agreement between the lessee and the under-lessee. In the first place, it seems to me utterly impossible to construe that agreement so as not to include a covenant against assigning, because it is to contain the like provisions, conditions, and stipulations in all respects except one in particular that is mentioned. It is impossible to say that the power of re-entry in the case of an assignment without consent is not one of the provisions, conditions, and stipulations. Therefore, plainly the right of re-entry, if there is an assignment or under-lease, must be inserted.

Then whose name is to be put in? Surely it must be the name of the person who is the lessor in that lease which is to be made. Indeed, I have very great doubts, even if the original lease from Lord *Sidmouth* and the original license bore a different construction from what they do, whether the words are not so clear

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that it would be impossible to construe them otherwise. If it turned on the construction of the agreement alone, without any reference to the original lease and license, I should consider these words too clear to admit of any other construction. It would be most unusual to make the license to be given by anybody except the person who, beyond all question, is the only person who can exercise the power of re-entry, namely, the lessee and his assignee. It would be a most arbitrary and extraordinary provision (I do not say it would not be good if found in express terms) to require the consent of any person but the owner of the reversion, as he alone can act if the covenant is broken. I have no doubt that, according to the proper construction of the agreement, it is the consent of the under-lessor that is to be required.

Solicitors for the *Chatterley Iron Company:* Messrs. *Worthington Evans & Cook.*

Solicitors for Mr. *Baddeley:* Messrs. *Lewis, Munns, & Longden.*

Solicitors for Mr. *Williamson:* Messrs. *Wedlake & Letts.*

L. JJ. 1874 *April* 23.

LAING *v.* ZEDEN.

[1870 L. 131.]

Interpleader—Two Suits—Costs.

A. and *B.* both claimed goods which were in the hands of shipowners. *B.* had mortgaged to *C.* *A.* filed a bill against the shipowners and *B.*, claiming the goods. Then *C.* brought an action against the shipowners for non-delivery, after which *C.* was added as a Defendant to *A.'s* suit. Then the shipowners filed a bill against *C.* to restrain the action, and an injunction was granted on an undertaking for damages:—

Held, that as the second suit was against one only of the claimants, the Plaintiffs in the second suit could not have their costs as on a bill of interpleader, and must pay costs and damages to the mortgagee.

Order of *Bacon*, V.C., reversed.

THIS was an appeal from an order of Vice-Chancellor *Bacon*, giving to the Plaintiffs in the suit their costs out of a fund in dispute.

One *Hathesing* and his partners were cotton brokers at *Bombay*,

and had been employed by *Harbord & Co.*, merchants at *Bombay*. In June, 1870, *Hathesing's* firm bought and shipped some cotton, and a dispute arose whether *Hathesing* had retained possession of the cotton, or had parted with it to *Harbord & Co.* *Harbord & Co.* obtained bills of lading from the captain of the ship, and drew two bills of exchange for £1000 each, each of which was attached to a bill of lading, and was indorsed by *Harbord & Co.* for value to a bank called the *Comptoir d'Escompte*, to whom a letter of hypothecation was also given. The owners of the ship were Messrs. *Laing & Gourley*, and she was consigned to one *Zeden* at *Liverpool*, as ships' agent. In September, 1870, *Hathesing's* firm filed a bill of *Hathesing* v. *Laing* against *Laing & Gourley* and *Zeden* and *Harbord & Co.*, praying a declaration that *Hathesing's* firm were entitled to the cotton, and if not, then that *Laing & Gourley* might make good to *Hathesing* and his partners the value of the cotton. An *ex parte* injunction was then granted restraining *Zeden* and *Laing & Gourley* from parting with the cotton. In October, 1870, the *Comptoir d'Escompte* commenced an action against *Laing & Gourley* for damages for non-delivery of the cotton; the *Comptoir d'Escompte* were then made parties to the suit of *Hathesing* v. *Laing*.

On the 8th of December, 1870, *Laing & Gourley* filed the bill in this suit againt *Zeden* and the *Comptoir d'Escompte*, praying for an injunction to restrain the *Comptoir d'Escompte* from proceeding with their action, and an injunction was accordingly granted on an undertaking as to damages.

The two suits were heard before Vice-Chancellor *Bacon*, who held that *Hathesing's* firm could not maintain their claim, and dismissed with costs the bill in *Hathesing* v. *Laing;* and gave to the Plaintiffs in *Laing* v. *Zeden* their costs out of the fund; as reported (1).

The *Comptoir d'Escompte* appealed.

Mr. *Kay*, Q.C., and Mr. *B. B. Rogers*, for the *Comptoir d'Escompte*, asked that the Plaintiffs might pay the costs of the suit and damages for detaining the cotton, and cited as to damages *Newby* v. *Harrison* (2).

(1) Law Rep. 17 Eq. 92, 108.

(2) 3 D. F. & J. 287.

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Mr. *Miller*, Q.C., and Mr. *E. Beaumont*, for the Plaintiffs, cited *Nelson* v. *Barter* (1).

SIR W. M. JAMES, L.J.:—

I am of opinion that the decision of the Vice-Chancellor in this case cannot be sustained.

The *Comptoir d'Escompte* had a clear legal right to this cotton, and their right was not affected by any equity whatever. Having that legal and equitable right, they brought an action against the Plaintiffs in this suit, to which action the Plaintiffs in this suit had no defence. Thereupon the bill in this suit was filed.

It appears to me that the *Comptoir d'Escompte* have sustained damages by reason of that proceeding, and that they are entitled to have those damages ascertained and paid.

It has been argued, however, that *Laing & Gourley* were mere stakeholders, and that it was perfectly immaterial to them whether they delivered the goods to the *Comptoir d'Escompte* or to the other claimants, and that they must have their costs. But the only case in which a Plaintiff under such circumstances obtains his costs is when he has filed a bill of interpleader. That rule, however, has no application when the bill filed is merely equivalent to a bill of interpleader. A bill of interpleader does not always work complete justice, but it does so as far as possible. It gives relief between the two claimants, and it stops other litigation. The stakeholder has his costs out of the fund, and the Defendant who is in the wrong has then to indemnify the Defendant who is entitled to the fund. Here the Plaintiffs have not given the *Comptoir d'Escompte* any chance of getting their costs out of the other party. Then it is said that the *Comptoir d'Escompte* ought not to have brought the action after the injunction was granted. But the injunction did not affect them, and we in this suit know nothing about that injunction.

The bill must be dismissed with costs, and we must direct an inquiry as to damages.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

(1) 2 H. & M. 334.

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I am quite clear that at law the remedy was solely against the present Plaintiffs. The Defendants had a clear title on a bill of lading, but the Plaintiffs would not deliver the goods because a third person, without any real title, asserted a claim. The only remedy of a person in the Plaintiffs' position is by a bill of interpleader. If he does not choose to file such a bill, but litigates with both parties separately, he is left liable to the party who is really entitled.

Then it is said this was as good as a bill of interpleader. But it did not bring the parties together, and it left the Defendants no remedy over for costs against the other party. The appeal must be allowed.

Solicitors for the *Comptoir d'Escompte*: Messrs. *Lyne & Holman*.
Solicitors for *Laing & Gourley*: Messrs. *Lowless & Co.*

BULLEY *v.* BULLEY.

L. JJ. 1874 May 25, 26.

[1872 B. 223.]

General Devise—Proof of Seisin—Evidence—Admissions—Setting aside Deed—Purchaser for Valuable Consideration—Jurisdiction.

A testator, who died in 1760, made a general devise of freeholds and copyholds to his daughter in tail. His grandson was in 1783 admitted to the copyholds as tenant in tail, and was proved to have been in 1833 in possession of the copyholds and of certain freeholds then held therewith. He made a will purporting to devise these freeholds and the copyholds, and died in 1840. His brother and heir in 1841 executed a deed purporting to be for the purpose of barring any estates tail in the freeholds, whereby he conveyed the freeholds to the devisee under the will, and covenanted to surrender the copyholds. This deed was not inrolled, but the devisee was admitted to the copyholds. The devisee died intestate, and his brother succeeded him as his heir, and made a will purporting to devise the freeholds and the copyholds in fifths, the Plaintiff taking one-fifth and the Defendant another fifth. The Defendant afterwards agreed to buy the Plaintiff's one-fifth, and a conveyance was made by her conveying to the Defendant her one-fifth and all her estates and shares in the land, neither of them being aware of the earlier title. Four years afterwards the deed purporting to bar the estate tail was found, and thereupon the Defendant requested the Plaintiff, who was heir in tail of the original testator, to confirm the sale, and sent to her the draft of a deed reciting that the original testator was

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seised in fee of the freeholds and devised them, and that she was tenant in tail. She then filed a bill to have her conveyance set aside and to be declared tenant in tail of the freeholds:—

Held, that the conveyance by the Plaintiff of the fee in the whole when she had intended to convey one-fifth only might embarrass her in proceeding at law, and that this Court must determine the question; but

Held, that the Plaintiff was bound to shew that the original testator was seised in fee of the freeholds claimed by her, and that as she had not done so, her bill must be dismissed:

Held, that, under the circumstances, the sending by the Defendant of the draft deed stating that the original testator was seised in fee was not an admission by the Defendant of the fact.

The effect of admissions discussed.

The Defendant had conveyed his estate to mortgagees:—

Held, that they, as purchasers for valuable consideration without notice, could not be interfered with.

Decree of *Bacon*, V.C., affirmed.

THIS was a suit respecting about fifteen acres of land, forming part of a farm called *Ashman's Farm*, at *Woodham Walters*.

John Raven, who died in 1760, was in the bill alleged to have been, at the date of his will and at his death, seised or otherwise well entitled to *Ashman's Farm*, whereof part was freehold and part copyhold.

John Raven's will, dated in 1746, contained this devise:—

"Also I give and devise all and every my messuages, lands, tenements, hereditaments, and real estate whatsoever, as well freehold as copyhold, and wheresoever situate, lying, or being, unto my loving daughter *Mary Raven*, and the heirs of her body lawfully to be begotten, for ever; and in default of such issue, I give and devise the same to my nephew *John Raven*, son of my brother *William Raven*, and his heirs for ever."

Mary Raven, in 1763, married *Richard Bulley* the father, and had three sons, *John Bulley*, *Richard Bulley*, and another. *Mary Bulley* was, in 1765, admitted to the copyholds devised by the will of *John Raven*, and after her death her husband was admitted as tenant by the curtesy. After his death, in 1781, *John Bulley*, the son of *Mary Bulley*, was admitted to the copyholds; and on the 31st of May, 1832, he surrendered them to the use of his will. In 1840, he made a will, purporting to devise "All that the freehold part or parts of all that messuage," &c., called *Ashman's Farm*, to *Thomas White* (who renounced) and *Henry Bulley* (a son

of *Richard Bulley*, the son), on trusts for sale and division of the proceeds amongst four persons; and the trustees were directed at the same time to sell "All the copyhold part or parts of all that messuage," &c. *John Bulley* died in 1840.

By a deed dated the 22nd of October, 1841, and made between *Richard Bulley*, the son, of the one part, and *Henry Bulley* of the other part, after reciting the will of *John Bulley*, and that *Henry Bulley*, on behalf of himself and of the creditors of *John Bulley*, had requested *Richard Bulley*, the son, to confirm and carry into effect the trusts of the will of *John Bulley*, and that, for the purpose of destroying as well the estate tail of him the said *Richard Bulley*, as all other estates tail of and in such parts of the messuage called *Ashman's* as were freehold, and for disposing of the same for an estate in fee simple absolute, and for the purpose of carrying the will of *John Bulley* into execution, *Richard Bulley* the son agreed to convey the same in the manner therein mentioned, it was witnessed that *Richard Bulley*, the son, did grant unto *Henry Bulley* and his heirs all such parts of *Ashman's Farm* as were freehold, to hold the same unto *Henry Bulley* and his heirs on trust to sell the same, and with the proceeds to pay the creditors and divide the residue between the four persons mentioned in *John Bulley's* will. The deed further contained a covenant to surrender the copyholds to the same uses. In the covenants for title, *Richard Bulley*, the son, covenanted that he was seised for a good estate in fee simple or in fee tail in possession. *John Raven's* will was not mentioned in the deed. On the 26th of October, 1841, *Richard Bulley*, the son, as heir-at-law of *John Bulley*, was admitted to the copyholds, and at the same Court, he, for the purpose of barring all estates tail and reversions, surrendered the copyholds to the use of *Henry Bulley*, his heirs and assigns. The deed above mentioned was never inrolled in Chancery.

Henry Bulley paid *John Bulley's* debts, and by a deed dated the 22nd of April, 1842, the four persons interested under *John Bulley's* will in the proceeds of the sale, released their interest in the land to *Henry Bulley*. *Henry Bulley* died without issue in 1849, intestate, leaving as heir-at-law his father, *Richard Bulley*, the son. *Richard Bulley* the son died in 1851, having by his will purported

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to devise the farm called *Ashman's* to his eldest son, *William Bulley*, for life, and after his death on trusts for sale and division of the proceeds between five persons, one of whom was the Plaintiff, *Emily Elizabeth Bulley*, the only child of *William Bulley*, and another was the Defendant *John Bulley*.

William Bulley died in 1854. The Defendant *John Bulley* appeared to have been in possession of the farm, and he, after the death of *William Bulley*, accounted to *Emily Elizabeth Bulley* for one-fifth of the rents of *Ashman's Farm*, as under the will of *Richard Bulley*, the son.

The copyholds were enfranchised in 1866.

In 1867, *John Bulley* entered into a correspondence with *Emily Elizabeth Bulley*, telling her that she was entitled to one-fifth of the farm; which one-fifth she agreed to sell for £250, and by an indenture prepared by *John Bulley's* solicitor, and dated the 19th of August, 1867, she, in consideration of £250, purported to grant and assign to *John Bulley* "all her one-fifth part or share, and all other her estates, shares, parts, and interests of and in all that and those farms called *Ashman's*," &c. The shares of *John Bulley* in the land were afterwards conveyed by *John Bulley* to a sort of bank called the *South Essex Equitable Advance Company*, by way of security for £620.

In 1871, the deed of 1841 was found, and it was discovered that the deed had not been inrolled. It appeared that before this time none of the parties were aware of the earlier title to the lands, and *John Bulley's* solicitors thereupon applied to *E. E. Bulley* to execute a deed in confirmation of the sale. A draft of a deed was sent to her by *John Bulley's* solicitors, reciting that *John Raven* was seised in fee, and reciting the will of *John Raven*, and that the estate tail in the lands in question had not been effectually barred, and that it was apprehended that it had become vested in *Emily E. Bulley*, and purporting to be a conveyance by her of the freeholds for the purpose of barring her estate tail, and by way of confirmation by her of the deed of 1867.

From this draft the Plaintiff first learnt that she was, as heir in tail of *John Raven*, entitled, as she alleged, to the whole of the land in question, and not to one-fifth only: and she then filed the bill in this suit against *John Bulley* and the *South Essex Equitable Advance Company*, alleging, as above partly stated, and praying

that the deed of 1867 might be declared void, and that she might be declared "tenant in tail in possession of the said freehold lands and hereditaments devised by the will of the said *John Raven*."

The Defendant *John Bulley*, by his answer, did not admit that *John Raven* was seised of the land in question, and left the Plaintiff to make such proof thereof as she might be able. The Defendant did not admit that any part of the farm was originally freehold, and stated his belief that all, or nearly all, was copyhold, and alleged that the Plaintiff must specify what parts, if any, were freehold. He alleged further that part of the present freeholds might have been encroachments on the waste, or might have been bought after the death of *John Raven;* and that *John Bulley*, in making his will, spoke of freeholds merely by precaution, and to include everything.

The Defendants, the *Advance Company*, besides defences similar to those set up by the Defendant *John Bulley*, pleaded that they had the legal estate as purchasers for valuable consideration without notice.

There was no evidence as to the state of the farm prior to 1833. At that time there were about thirty-seven acres in detached pieces, of which part was considered to have been formerly copyhold, and could be traced from the admittances under the will of *John Raven*. The part claimed by the Plaintiff as freehold was about fifteen acres; and as to this there was no description in any deed, and no evidence going back further than 1833.

The Vice-Chancellor *Bacon* was of opinion that, on the evidence of the state of the farm since 1833, and of the admittances, the identity of the freeholds had been made out by the Plaintiff. He thought further, that the admissions contained in the draft deed sent to the Plaintiff bound the Defendant *John Bulley*, so that the Plaintiff could have recovered in an ejectment. His Honour, however, was of opinion that the deed of 1867 did actually pass the legal estate to *John Bulley*, and that he had conveyed it to the *Advance Company*. They had, therefore, the legal estate purchased for value, and without notice of the Plaintiff's title. The irresistible consequence was that the Plaintiff's claim must fail, and the bill be dismissed, but without costs.

The Plaintiff appealed.

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Mr. *Kay*, Q.C., and Mr. *Pemberton*, for the Plaintiff:—

It is not incumbent on us to shew that *John Raven* was seised of the land in question, but if it was incumbent we have given sufficient proof. It is impossible to give strict proof of seisin 130 years ago, and the fact that the copyholds have been held all this time as part of the farm, is enough to shew that the freeholds were so too. At all events, the proposed deed of 1871 amounts to a sufficient admission by *John Bulley* that the land did pass under *John Raven's* will: *Heane* v. *Rogers* (1). It is clear that the Plaintiff only intended to convey one-fifth of the farm, and if the deed has unintentionally been so framed as to carry the legal estate in the whole, it ought either to be set aside, on repayment by the Plaintiff, or declared to pass one-fifth only, and the Defendants ought to be put on terms not to plead that it passed the whole legal estate: *Rooke* v. *Lord Kensington* (2); *Harris* v. *Pepperell* (3); *Cooper* v. *Phibbs* (4). In *Sugden's* Vendors and Purchasers (5), *Bingham* v. *Bingham* (6) is distinctly approved of. If the *Advance Company* are to be taken as purchasers for value without notice, we ought to be at liberty to redeem them. There can be no doubt that, at all events, some of *John Raven's* land was freehold, and that is enough to support the bill. There is nothing on the other side but vague suggestions that the freeholds might have been acquired since that time.

Mr. *Swanston*, Q.C., and Mr. *Everitt*, for *John Bulley*:—

The Court cannot make a new contract between the parties, and, as there is no pretence for setting the deed aside, there is nothing to be done. Besides, the object of the deed was to buy out the Plaintiff's interest whatever it might be. At the utmost, there was a mistake as to the legal estate, and that this Court cannot interfere with: *Pilcher* v. *Rawlins* (7). There was no fraud: *Marshall* v. *Collett* (8). The draft deed cannot be taken as an admission against us: *Lord Londesborough's Case* (9).

(1) 9 B. & C. 577.
(2) 2 K. & J. 753.
(3) Law Rep. 5 Eq. 1.
(4) Ibid. 2 H. L. 149.
(5) 14th Ed. 245.
(6) 1 Ves. Sen. 126.
(7) Law Rep. 7 Ch. 259.
(8) 1 Y. & C. Ex. 232.
(9) 4 D. M. & G. 411, 423.

Mr. *Eyre*, for the *Advance Company*.

Mr. *Kay*, in reply.

SIR W. M. JAMES, L.J.:—

I am of opinion that the Vice-Chancellor's order dismissing the bill ought not to be disturbed. In the argument before us, the *Advance Company* was relieved by us from the necessity of taking any part in the argument, because it appeared to us that there was no ground whatever for bringing the company into this Court. They are, as the Vice-Chancellor has held, purchasers for valuable consideration without notice, and they are entitled to hold whatever they got as security for the money they had advanced; and they are entitled to avail themselves of whatever legal estate they have. It appears to us that the *Advance Company* ought not to be called upon to bear any costs, and ought to have their costs of the suit as well as the costs of the appeal, and to that extent the order will be varied.

The case as between the Plaintiff and *John Bulley* stands differently. The Plaintiff says that she sold her fifth share under the will, supposing that she was entitled to a fifth only. *John Bulley* supposed that he was trustee under the will, and they both supposed the same thing. Then she says she conveyed to him her one-fifth of the freeholds and her one-fifth of the former copyholds, but that the conveyance contains general words which would embarrass her in any attempt to proceed to recover what she says is her legal right. That legal right she describes thus: "I have found out that I was entitled as tenant in tail absolutely to the whole of the freeholds, which amount to fifteen acres out of thirty-seven; and instead of being entitled to a fifth of the freeholds and copyholds, I was entitled to those fifteen acres absolutely as tenant in tail; and I now come here to have my right to those fifteen acres determined in a Court of Equity."

At first it appeared to me that there was no ground whatever for setting aside the conveyance which was made upon an honest sale of the fifth. But it also appeared to me that, inasmuch as by the operation of the general words another effect might be given which is totally different from anything which was in the con-

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templation of the parties, we might upon some terms declare that those general words were not to be used as a defence to any legal proceedings which she might take as against *John Bulley*, and then leave the whole matter to be tried at law. But I then considered that that would not be right, for if the question was sent to law she might not merely be embarrassed by the introduction of those general words, but the very deed itself, reciting the will of *Richard Bulley* and the trust, would be an estoppel, or would very likely be held to be an estoppel to prevent her from disputing the fact that the testator who made that will had a seisin of the property sufficient to carry the estate. I have therefore come to the conclusion—and the Lord Justice concurs with me—that we ourselves must determine the question, looking at this bill as an equitable ejectment—looking at the words, and not holding her bound, as she would not be bound in this Court by any undesigned operation of those words, and seeing what is her right, not with respect to the fifth which she has sold to the Defendant, but with respect to the other fifth which he has only taken as a volunteer by the operation of the second will.

The owners of the other three-fifths are not before us, but no objection has been taken for want of parties, and we have to determine what would be her rights as between herself and *John Bulley*, that is to say, whether she has made out her right as tenant in tail to recover those parts of the property which she has not sold to *John Bulley*.

Now I am of opinion that the burden of proof is entirely upon her. She says she is heir in tail of a person who by his will in the year 1746 created an estate tail. That estate tail was created by general words devising all the freehold and copyhold estates of which that person was seised; and she has to prove that he was seised, and she has to identify the fifteen acres in question as having been the property of the original testator, and as having remained and descended through the different members of the family until the present time.

Now the only evidence before us is, first, that there were copyholds which did pass under that will. Those copyholds have been traced from that testator down to the present time; but, to my mind, that affords no kind of proof which the Court could rely

upon that these freeholds are *de facto* now held by the same persons and by the same title, and were part of an estate created by the same will made more than a century ago. There is no presumption, it seems to me, arising from the common possession of the two kinds of property, freehold and copyhold, during the period to which the memory of the witnesses can go back.

But then it is said that there is a thing which was intended to be a deed, and which was sent by the Defendant's solicitor to the Plaintiff for her to execute in order to bar the estate tail; and that document, it is said, contains a direct recital and a statement which amounts to an admission by the Defendant, through his solicitors, that the title was a title derived under the will of *John Raven*. Of course that admission, like every other admission made by a Defendant, or made by his agents in the course of business, is admissible as evidence against him; but it is always for the Court to consider what weight, if any, is to be given to an admission, or any other evidence; it is not conclusive merely because it is legally admissible. Now it is quite obvious that neither *John Bulley* nor his solicitors could, of their own knowledge, know anything whatever of facts which had occurred in the year 1746, or at the time of the death of *Raven*, who died in 1760. *John Bulley* and his solicitors have told us, and we believe them, how those admissions came to be made, that is to say, as to how those recitals, which are supposed to be admissions, came to be inserted in that document. They say they had found the deed of 1841, and from that deed they arrived at the conclusions which they had stated in those recitals; but it was simply from that deed and from nothing else; and they ask the Court to disregard a statement made by them under those circumstances, and to have regard only to the facts and to the document from which they came to that conclusion, as they now say, erroneously. And I am of opinion that they are entitled to say that the Court must disregard entirely what they said, and must refer to the deed, which was the foundation of what they said.

Independently of that deed which was found in 1871, the thing stands thus: long uninterrupted possession; the person in possession devises by will; there is possession under that will—then another will—and possession under that will. That is the strongest

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possible evidence one could have of an estate in fee simple, and would give as strong a title as anybody could be asked to produce—one of the safest titles, apparently, which anybody could rely upon in this country.

[His Lordship then stated his opinion that the only meaning to be given to the deed of 1841 was, that if there was an estate tail *Richard Bulley* the son was willing to bar it, and if an estate in fee simple, to convey it.]

I agree with the suggestion that is made in the answer, that, looking at the length of time between the will of the original testator and his death—looking at the length of time during which *John Bulley* the grandfather was in possession of the property, and seeing what the property is, consisting of parcels, some of them detached—looking at the nature of the copyhold parcels and the freehold, it is quite as probable that either the original testator, after making his will, acquired some of those freeholds, or that some other person acquired them, as that there has been a continued estate tail left unbarred by the persons who were the successive owners of it, and who in two instances professed to deal with it by their wills as if they were tenants in fee simple.

Under those circumstances I am of opinion that, determining the question as on an equitable ejectment to recover land to which the Plaintiff alleges she is entitled (it is not necessary therefore to go into other difficulties which there might have been in the way of giving the relief asked), she has failed to prove that title which was the foundation of her suit, and, therefore, the bill must remain dismissed.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

In the first place, I agree that we must decide the question of title. It would be impossible to give any relief, leaving the title to be determined at law, because whatever the nature of the title—whether the claimant has proved that she had an estate tail or not—the legal estate is unquestionably at the present moment in the company, and it is quite clear that the *Advance Company* cannot be deprived of any legal estate that it now possesses. Then how can we give any relief which would leave the question of the

legal estate to be tried at law? It is said that we might declare the deed to be void so far as relates to what was not intended to be conveyed as between the Plaintiff and the Defendant *John Bulley*, and then we might give the Plaintiff leave to redeem the *Advance Company*. But then, unless she has made out that she really has an estate tail vested in her, why should we give her the right to redeem the *Advance Company*, a proceeding which might put all the other parties in a very different situation from what they otherwise would be in? It appears to me, therefore, that we cannot give any relief so as to enable the title to be tried at law, and that we must decide for ourselves whether the Plaintiff has made out that she actually was, at the time she executed the conveyance to *John Bulley*, tenant in tail of the whole estate. Therefore this is to be looked at as if it was an ejectment at law brought by a Plaintiff who says, "I am tenant in tail under an entail which was created by the will of *John Raven* in the year 1746."

When a person sets up a case of that kind, which from the peculiar circumstances happens not to be barred by the *Statute of Limitations*—when a person sets up a title which commenced in the year 1746, what she has to prove at the outset is that the testator was, at the time when he made his will, seised in fee of those hereditaments; and I am of opinion that, not only is the burden of proof on the Plaintiff, but that the safety of titles requires that the Court should see that she proves her case very strictly. Here *John Bulley*, who certainly had this land in 1833, left it by his will on the assumption that he was entitled so to leave it; and when he died the persons who took it under that will have enjoyed it. Then there has been another will, and then, after all that period of time, it is sought to prove that in reality he was only tenant in tail, that it went from him to his brother *Richard Bulley*, and then went to *Richard Bulley's* son, and from him to the Plaintiff, *Emily Elizabeth Bulley*. Then, the burden of proof being on the Plaintiff, and the law, as I think, requiring that the case should be proved very clearly, let us see whether it is made out.

I will first consider whether it is made out independently of the admission which is contained in the deed which was sent to the Plaintiff to be executed, and which she refused to execute. The

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real truth is, that this entirely depends upon what is the real effect of the indenture of the 22nd October, 1841; and in my opinion, independently of that, there is no evidence whatever. Without going through the evidence in detail, I think the copyhold tenements are traced. But the question is, what evidence is there that *John Raven* was also seised in fee of these freeholds? The Plaintiff must prove that he was seised in fee of the whole of them, because she cannot otherwise recover in ejectment. It is not enough to make out that out of the fifteen acres of freehold which she seeks to recover, some portion, more or less, probably belonged to *John Raven* at the time he made his will, and therefore was entailed; because if any portion may have been acquired since that time, those portions were not, of course, entailed; and if we cannot tell which of the freeholds were so acquired, if it is possible that some were and that others were not, then of course, inasmuch as the Plaintiff has no evidence to shew which of the particular lots she is entitled to recover, the Plaintiff could not recover in ejectment anything whatever.

Then what is the evidence? To my mind it depends entirely upon the effect of this deed of the 22nd of October, 1841, because the mere fact that *John Bulley* was in the year 1832 or 1833 in possession of those freeholds is unquestionably no evidence that he had acquired them under *John Raven's* will. It is perfectly consistent with that fact that *John Raven* may have bought them after he had made his will, or that *Mary Raven* may have bought them, or that *Richard Bulley*, the husband of *Mary Raven* and the father of *John Bulley*, may have bought them, or that *John Bulley* himself may have bought them, or that somebody may by will have left them to one of the heirs in tail. The mere circumstance that the lands are found together is, in my opinion, no evidence. It is quite possible that the original estate was exclusively, or nearly so, a copyhold estate, and that the freeholds were all acquired since, and therefore that is no evidence.

[His Lordship then pointed out that the deed of 1841 left it uncertain whether *John Bulley* had an estate tail or an estate in fee.]

The way in which the deed was dealt with rather confirmed the notion that it was doubtful, because the parties acted on the

covenants and surrendered the copyholds for the purpose of barring the estate tail; but they never inrolled the deed, so as to affect any freeholds, the inference from which is that they discovered, or thought they had discovered, that there was no estate tail in the freeholds, and therefore it was not necessary to inrol the deed. They did not keep it among the title deeds, and the only fair inference from that was, that they did not consider it necessary.

It appears to me that in that state of things we have not arrived at any proper evidence which a Judge ought to advise a jury to trust to, that *John Raven* was really seised in fee.

Then we come to the effect of the admission contained in the draft of the deed prepared by *John Bulley's* solicitor and sent to the Plaintiff. No doubt that is an admission; but as to the effect of an admission, it is like all other evidence—you must consider the circumstances under which it is given, and what weight is fairly to be attached to it.

Now there are two matters which seem to me very largely to detract from this as an admission. In the first place, it is not an admission of what a man himself knows. If a man admits that he said something, or that he did something, or admits something which is within his own knowledge, that is, of course, very strong evidence against him, unless he shews why he said so, if it was not true; but if a person merely admits what happened 120 years ago, he cannot possibly know it of his own knowledge; and if the whole of the evidence on which he made his admission was the inference which his solicitor drew from the state of the title, it is for us to judge, having all the facts before us, and all the materials upon which the solicitor made that admission, what the worth of that admission is, which we can do as well, or better than the solicitor could himself. And another thing which detracts from the weight of the evidence is, that it was made for the purpose of getting a confirmation of the title, and is merely a recital in a deed sent to be executed for the purpose of making a good title.

Moreover, the letters do not admit that the Plaintiff was entitled to the whole of the estate in tail, but treat the defect merely as a slip, and as something they want to have set right; and it is fairly open to the Defendant's solicitor to say, "It is perfectly true that

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we put in those recitals, because we thought she would execute it, and that would make the title safe; but if we had thought she would not have executed it, we should not have put them in, and they were only put in for the purpose of obtaining the confirmation."

On the whole, therefore, I am of opinion that this case must be decided against the Plaintiff, on the ground that she has not proved to our satisfaction as a jury that *John Raven* was seised in fee of these freehold premises at the time when he made his will.

Solicitors for the Plaintiff: Messrs. *Woodbridge & Sons.*

Solicitor for the Defendants: Mr. *Ernest Digby*, agent for Messrs. *Digby & Son, Maldon.*

L. JJ. 1874 *June* 5.

Ex parte KEVAN. *In re* CRAWFORD.

Fraudulent Preference—Payment in Pursuance of a previous Agreement—Payment in ordinary Course of Business—"Payee in good Faith and for valuable Consideration"—Bankruptcy Act, 1869, *s.* 92.

20 L. T. 750
W. R. 325.

C., a manufacturer in *England*, was in the habit of purchasing flax from *P.*, in *Belgium*, whose sister he had married. In August, 1872, he owed upwards of £4000 to *P.*, as the executrix of her mother's estate; and also £800 on the current account between *P.* and himself; and being pressed by her for payment he promised to send £2350 on account of the debt to the estate. On the 4th of November, 1872, *C.* sent bills to the amount of £4000 to *P.*, who received the proceeds, and applied £2350 towards the debt to her mother's estate, and carried the rest to the account current between *C.* and herself, and with that sum and other sums afterwards remitted she purchased flax, and consigned it to *C.* *C.* was at that time in insolvent circumstances, and on the 5th of November committed an act of bankruptcy, on which he was adjudicated bankrupt on the 28th of November. The trustee claimed the sum of £4000, as having been paid to *P.* by way of fraudulent preference:—

Held (affirming the decision of *Bacon*, C.J.), that there was no fraudulent preference.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

The bankrupt, *John Crawford*, had for several years previous to

his bankruptcy carried on the business of a flax and tow spinner at *Pendleton*, under the firm of *Crawford & Co.*, in which firm he was the sole partner; and at *Shepley* under the firm of *Crawford & Rogerson*. *Rogerson*, though nominally a partner, was paid by a salary and a commission, and had no other interest in the partnership. For the purpose of his business *Crawford* was in the habit of buying large quantities of tow and flax in *Belgium*, and he had extensive dealings in this way with a Madame *Putman*, a widow, resident at *Courtrai*, who there carried on the trade in which her deceased husband had been originally engaged. *Crawford* had married one of her daughters. On the 30th of September, 1867, the balance due from him was £4352 19*s.*, which was settled and acknowledged in a letter addressed by him to Madame *Putman*.

After this settlement a further account in respect of similar dealings went on between the same parties until September, 1870, when the widow *Putman* died. By the account then made up it appeared that there was due from the firm of *Crawford & Rogerson* to her estate a further balance of £1940 5*s.* Mdlle. *Marie Putman*, her daughter and legal personal representative, continued the same business, and had similar dealings with the bankrupt. In August, 1872, he was, in the course of his business, at *Courtrai*, and Mdlle. *Putman* requested him by letter and in person to make her some payment on account of the amount he owed, and the more especially because she had paid a large sum on account of her mother's estate, and had more to pay, and required money for the purpose of making the necessary purchases incident to her business. A rough statement was made out, shewing that she required at once £2350 or £2400 to reimburse her in respect of moneys which she had expended on account of the estate, and *Crawford* agreed to send her that amount about the end of October or the beginning of November, that being the season when purchases of tow and flax are usually made of the growers. *Crawford* was also indebted to Mdlle. *Putman* upon the balance of the account current between them to an amount somewhat exceeding £800.

On the 4th of November, 1872, *Crawford* having some bills of exchange, which belonged to the firm of *Crawford & Co.*, trans-

L. JJ. 1874 *Ex parte* KEVAN. *In re* CRAWFORD.

mitted them to a Mr. *Van Doep*, a banker at *Courtrai*, with a request that he would discount them, and hold at the disposal of Mdlle. *Putman* 100,000 francs (£4000), part of the aggregate amount of the bills. On the same day he wrote to her informing her that he had instructed Mr. *Van Doep* to pay her £4000.

On the 28th of November *Crawford* was adjudicated bankrupt in the *Salford* County Court, on an act of bankruptcy committed on the 5th of November.

Under these circumstances the County Court Judge considered that the payment of the sum of £4000 to Mdlle. *Putman* was a fraudulent preference, and ordered it to be repaid to the trustee. From this decision Mdlle. *Putman* appealed to the Chief Judge.

It appeared from the books kept by Mdlle. *Putman* that of this sum of £4000, £2350 were retained by her in payment of the sums expended by her on account of her mother's estate, and the remainder was carried to the current account between her and *Crawford*, and was applied, together with other sums afterwards remitted by *Crawford* to Mdlle. *Putman*, in the purchase of consignments of flax, which she continued to send to *Crawford* till after his bankruptcy.

The Chief Judge was of opinion that Mdlle. *Putman*, at the time when the sum of £4000 was remitted to her, was not aware of *Crawford's* insolvency, and that the payment was protected by the 92nd section of the *Bankruptcy Act*, 1869 (1). From this decision the trustee appealed.

(1) 1874. April 20. WN(1874)87

SIR JAMES BACON, C.J., after stating the facts of the case, and observing that he thought it clearly established that the debts above mentioned were due from *Crawford* to Mdlle. *Putman*, continued:—

Whether she is or is not liable to repay the £4000 to the bankrupt's estate depends wholly upon the law in bankruptcy as it is expressed in the 92nd section of the Act of 1869. It has been observed in former cases, some of which were referred to in the course of the argument, that the existing law upon the subject is, in some respects, different from the old law, and especially that it is free from the difficulties and uncertainty which were formerly found to exist. It enacts in substance that any payment made by any person unable to pay his debts, as they become due, from his own moneys in favour of any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person paying become bankrupt within three months after the payment, be deemed fraudulent and void as against the trustee in bankruptcy, but it also provides "that this section shall not

Mr. *Addison*, for the Appellant:—

After the decision of this Court in *Ex parte Butcher* (1), it is not open to me to contend that Mdlle. *Putman* could not protect

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affect the rights of a payee in good faith and for valuable consideration." In the present case the real question is, not so much what the bankrupt did or intended when he made the payment, as whether the payee received the payment in good faith and for valuable consideration. For, although the inability of the debtor to pay out of his own moneys, and the intention to prefer a particular creditor, should be clearly established, yet, unless it be also established that the creditor or payee was conscious of such inability, and concurred in and assented to the preference made in his favour, so as to be a partaker of the fraud, his rights cannot be affected by that act which the law declares to be fraudulent and void. That this is the plain meaning of the words of the enactment appears to admit of no doubt, and that it is consistent with the policy of the law and with justice, and with due regard to the general interests of the community, would be as little questionable, even if in the administration of this branch of the law it were competent to any Court to disregard the express words of the statute.

As far as the bankrupt alone is concerned, it is proved that at the time when he made the payment in question to the Appellant he was unable to pay his debts as they became due from his own moneys. There is no doubt that he came within the words of the first branch of the 92nd section. Whether he intended by the payment he made on the 4th of November to give the Appellant a preference over his other creditors, is much more questionable. He had married a daughter of the widow *Putman*, and so was the brother-in-law of the Appellant, between whom and himself kindly relations appear to have subsisted. But he had also been engaged for several years in the regular and ordinary course of his business with the house of *Putman*. *Courtrai* was the market from which he procured the necessary supplies of the materials required for his business, and those supplies were purchased for him and furnished by the house of *Putman* during the widow's lifetime and after her death by the Appellant, as well before as after the 4th of November, and down to and beyond the bankruptcy, without, as it would appear, any check or interruption, and these materials were regularly manufactured by the bankrupt, and, as to the last parcels of the goods furnished by the Appellant, by the trustee after the bankruptcy, as it was proper should be done for the purpose of keeping the bankrupt's mills going. The bankrupt had the strongest inducement to continue his business, and knew that to suspend the working of the mills would be, not only to stop his trade, but that, having regard to the nature of the property, which consisted in a great part of the mills and machinery, the value of that property must, if the working was suspended, be greatly depreciated. It was under these circumstances that in the month of November, 1872, being under an engagement to

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(1) *Ante*, p. 595.

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herself under the 92nd section of the *Bankruptcy Act*, 1869, if the evidence clearly established that she had no suspicion of *Crawford's* insolvency. But the onus is on her to shew that she had no such suspicion, and she has not discharged herself of this duty; on the contrary, the evidence tends to shew that there was collusion between her and *Crawford*. The fact of *Crawford's* insolvency is admitted, and his intention to give a preference to Mdlle. *Putman* is a fair deduction from the evidence. There is nothing to connect the remittance of the £4000 with the previous agreement. It is true that Mdlle. *Putman* applied part of it towards the debt due to her mother's estate, but she had no authority to do so. The whole of the remittance must be taken as paid to the current account between her and the bankrupt.

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send to the Appellant £2350, and knowing that he was indebted to her in a much larger sum, and it being the season for making considerable purchases of the raw material, which was at that season brought to market by the farmers and growers, he transmitted to her the £4000 in question.

If it should be concluded that in making that remittance his intention was to give the Appellant a preference over his other creditors (although I am not satisfied, having regard to all the facts in evidence, and notwithstanding the friendly relations which subsisted, that this would be the necessary conclusion), there remains the question to what extent, if at all, and for what reason, the rights of the payee should be affected by the conduct or the motives of the debtor. It is not suggested by any part of the evidence in this case that she was conscious of his embarrassments, or that she had done more than urge the payment of her just demand, or had expressed a wish to be preferred, or that she had any knowledge that she was, or was intended to be, preferred to his other creditors. I must, therefore, say that I am at a loss to find any ground upon which the order to refund which has been made against her can be supported, unless I wholly disregard the provision in the statute by which the Appellant's rights are protected.

Having regard to the facts in evidence, I am of opinion that at the time when the £4000 was remitted by the bankrupt to the Appellant, there was justly due from him to her, as her mother's representative, a much larger amount, and that he was also indebted to her in a further sum in her own right; that she had required payment in respect of these debts, and that she received the sum in question in perfectly good faith and for valuable consideration; that, in the very terms of the statute, her rights so to demand and retain the payment cannot be lawfully impeached or affected; and therefore that the order appealed from must be discharged, and that the trustee must be ordered to pay to her her costs of resisting the motion upon which that order was made, and the consequent proceedings in the County Court. I can make no order as to the costs of the appeal.

Mr. *Benjamin*, Q.C., and Mr. *Ambrose*, for Mdlle. *Putman*, were not called on.

SIR G. MELLISH, L.J.:—

I am of opinion that the order of the Chief Judge ought to be affirmed. I think that when the accounts are looked into, and the mode of carrying on the business between the bankrupt and Mdlle. *Putman* is considered, it is clear that there was not a payment with an intention to prefer her above the other creditors. Both the County Court Judge and the Chief Judge agree that *Crawford* could not, at the time when the payment was made, pay all his debts out of his own money, but it does not appear that he had at that time any immediate intention of stopping. It is in evidence that he went on making payments and remittances for some time afterwards.

It appears that there was an old debt due from *Crawford* to the estate of Madame *Putman*, for payment of which he was pressed by Mdlle. *Putman*, her executrix; and there is no doubt that in August, 1872, after some communications between them, it was agreed between them that *Crawford* should remit £2350 in October, or early in November. Mdlle. *Putman* said that she had made some advances on account of her mother's estate, and wanted to be recouped. The course of business between them was that Mdlle. *Putman* sent the bankrupt flax, and he sent her bills. It does not appear that there was any specific credit, but she sent flax at the time when he sent the bills, and the balance was sometimes on one side and sometimes on the other. On the 4th of November he transmitted 100,000 francs (£4000), of which sum 58,750 francs (£2350) were carried to the old debt from *Crawford & Rogerson* to the mother's estate, and the rest was kept in the general account between Mdlle. *Putman* and *Crawford*. If this is correct, it appears to answer the objection that there was no distinct statement in the letter as to the appropriation of the money, because both parties understood how the money was to be applied. Then the balance was treated as any other remittance in the ordinary course of business, and other remittances were afterwards sent by *Crawford* for the purchase of flax, one of them being as large as 25,000 francs.

L. JJ. 1874 *Ex parte* KEVAN. *In re* CRAWFORD.

It is difficult to say that any part of this payment was a fraudulent preference, because, as to £2350, it was a payment in pursuance of a previous agreement, and it is the same as if it had been paid in August, when the agreement was made, at which time *Crawford* had no thought of stopping. It is clear, therefore, that that payment was not a fraudulent preference. Then as to the balance, I cannot see any distinction between that remittance and the other remittances which followed it: they were all sent in consideration of flax to be purchased for *Crawford*, and, as I understand it, flax was actually sent as much in respect of that sum as of the subsequent remittances.

I agree with the Chief Judge that there is no evidence that Mdlle. *Putman* did not receive the payment *bonâ fide* and for valuable consideration, and I am of opinion that the Chief Judge's order was correct, and that the appeal ought to be dismissed with costs.

SIR W. M. JAMES, L.J.:—

I am of the same opinion.

Solicitors for the Appellant: Messrs. *Pritchard, Englefield, & Co.*, agents for Messrs. *Grundy & Kershaw, Manchester.*

Solicitor for the Respondent: Mr. *T. Parker*, agent for Mr. *W. Parker, Manchester.*

L. JJ. 1874 *July 7.*

CORPORATION OF HASTINGS *v.* IVALL.

[1871. H. 180.]

Security for Costs—Appeal—Nominal Defendant.

The Court has jurisdiction to make a Defendant who is appealing give security for the costs of the appeal, and will, where the Defendant is not a man of substance, and is merely a nominal Defendant, stay the appeal until security is given.

THIS was a suit by the Mayor, Aldermen, and Burgesses of *Hastings* against one *Ivall*, for the purpose of preventing the deposit of earth on the sea-shore at *Hastings;* and the principal question in the suit was as to the ownership of the sea-shore. The Vice-Chancellor *Malins* held that the Plaintiffs had shewn

enough to support the bill against the Defendant, and on the 6th of June made a decree for an injunction, with costs.

The Defendant had presented a Petition of re-hearing before the Court of Appeal.

The Plaintiffs now moved that all proceedings on the Petition of re-hearing might be stayed until the Defendant should give sufficient security for costs.

It appeared that the Defendant *Ivall* had been employed by one *Charles Moreing*, who had a large building estate at *Hastings*, and that since the suit *Ivall* had left *Hastings* and worked as journeyman for his brother, a milkman. He had entered into an agreement with *Moreing* by which he contracted to remove a large quantity of earth at a certain price, on condition that he could tip the earth into the sea. The suit was brought against *Ivall* in consequence of the deposit of earth on the sands in execution of this agreement. Some time after the commencement of the suit an agreement had been made between *Ivall* and *Moreing* that the suit should not be compromised without the consent both of *Moreing* and *Ivall;* that *Moreing* would pay the expenses of defending the suit; that if an adverse decision was made, *Ivall* should be answerable for any expenses given against him, and that if the Plaintiffs failed all expenses paid by them should go to pay the law costs as between solicitor and client, and after certain payments to *Moreing* the balance was to go to *Ivall.*

Mr. *Glasse*, Q.C., and Mr. *W. R. Ellis*, for the Plaintiffs:—

This is a mere imposition on the Court, and *Moreing* is the real Defendant, though we could not make him a party. The Court must have jurisdiction in such a case; *Burke* v. *Lidwell* (1), *Forrest* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (2), and *Natusch* v. *Irving* (3) are authorities. If the Defendant was a Plaintiff there would be no difficulty—*In re Jones* (4)—and an Appellant is in fact a Plaintiff.

Mr. *Cotton*, Q.C., and Mr. *Hemming*, for the Defendant:—

The Plaintiffs could have made *Moreing* a Defendant, but they have chosen, instead, to make a comparatively poor man a De-

(1) 1 J. & Lat. 703.
(2) 4 D. F. & J. 126.
(3) Gow on Partnership, 398.
(4) Law Rep. 6 Ch 497.

L. JJ. 1874

CORPORATION OF HASTINGS v. IVALL.

fendant, expecting an easy victory over him. They have prosecuted the suit against him, and cannot now come and ask security for costs. In *In re Jones* (1) the suit was, in fact, the solicitor's suit. *Ivall* was stopped by injunction, and the Plaintiffs undertook to be liable for damages, which *Ivall* may recover and receive. Even if *Ivall* is a pauper, that is no reason why he should be ordered to give security. If he is poor, it is this suit which has ruined him, by stopping him in his work. There is no authority whatever for such an application. £20 is fixed as the proper deposit by an Appellant, and it has never been increased. Even as regards a Plaintiff, he is only obliged to give security if he is out of the jurisdiction, and then only for £100. An appeal by a Defendant is a stronger case than a cross bill, where security is never ordered: *Vincent* v. *Hunter* (2). *Seaton* v. *Grant* (3) is an authority against any such interference with the ordinary course of practice. An appeal is only a re-hearing, and every appeal by a Defendant is as much a defence as on the original hearing. The real contest in this case is not against *Ivall* or *Moreing*, but against the Crown in respect of this shore, and the Plaintiffs hope to avail themselves of this suit as a precedent whenever they have to litigate with the Crown.

The indemnity agreement in speaking of expenses which might be paid by the Plaintiffs, refers not only to costs but to damages which they might have to pay under an undertaking they have given; and the moneys agreed to be given to *Moreing* are in reality repayments of advances which he has made, and of an additional price which he has paid to *Ivall* in consequence of the interference of the Plaintiffs, and which, if the suit failed, would be part of the expenses recovered back.

SIR W. M. JAMES, L.J.:—

I am of opinion, both on principle and on decided cases, that there is abundant authority in this Court to grant the application which has now been made.

The appeal in this case is admitted not to be the appeal of Mr. *Ivall*, and to have been brought upon the instructions and at the risk and liability of a person named *Moreing*. Who, then, is Mr. *Moreing*, and in what way is he connected with the suit? [His

(1) Law Rep. 6 Ch. 497. (2) 5 Hare, 320. (3) Law Rep. 2 Ch. 459.

Lordship then said that he was satisfied that *Ivall* was at first a mere workman, and that the contract was entered into between *Moreing* and *Ivall* for the purpose of preventing *Moreing* from being himself made defendant to the suit. If *Moreing* had simply, honestly, and truthfully employed *Ivall*, then *Moreing*, by the practice of this Court, would at once have been made himself a Defendant. His Lordship further stated his opinion to be that *Ivall* had no real interest in the matter, and had sold to *Moreing* any right he might have to the damages if awarded.]

Moreing is exactly in the position of any person who has bought a thing, and is suing in the name of a pauper for the thing that he has so bought. Therefore, if anything were wanting to enable the Court to require security for the costs of this appeal, it is the fact that, with regard to anything substantial, *Moreing* is the real and beneficial owner, and *Moreing* is bringing the appeal for the purpose of getting, if he succeeds, those costs which he has paid to his solicitors, and getting those damages which he expects to get. *Moreing*, as he was substantially the person to begin with, is substantially the Appellant here.

If there was no precedent to justify us, then, using the language of Lord *St. Leonards* in the case of *Burke* v. *Lidwell* (1), I would make a precedent, as I think I have authority now to do, and to say, that on the Plaintiffs undertaking not to enforce the costs against *Ivall* in the meantime this appeal shall not be proceeded with unless and until security for the costs of the appeal be given. The security will be settled by the Judge in Chambers, and there will be no costs of this motion.

SIR G. MELLISH, L.J.:—

I am of the same opinion.

MINUTES:—Plaintiffs undertaking not to enforce payment of the costs until the petition of appeal should have been heard or disposed of, order Defendant to give security to answer the taxed costs of the appeal if ordered to be paid by him, and in the meantime to take no further proceedings in the said appeal. No costs.

Solicitors for the Plaintiffs: Messrs. *Walker & Martineau.*
Solicitor for the Defendant: Mr. *Lydall.*

(1) 1 J. & Lat. 703, 706.

L. JJ.
1874
July 24.

HURST *v.* HURST.

[1872 H. 245.]

Practice—Exceptions to Answer—Discovery—Date of Deed under which Defendant claims—Forfeiture Clause—Bill by Trustee for Administration—Purchase for Value without Notice.

3 L.D. 570.

A testator gave real estates to trustees in trust for his son for life, with a gift over if he charged or incumbered them. One of the trustees filed a bill for the administration of the trusts of the will, and afterwards filed a supplemental bill against certain Defendants, who were in possession of part of the estates, alleging that they claimed under a charge made in their favour by the tenant for life, which operated as a forfeiture. The Defendants were interrogated as to the particulars of all charges in their favour, if any, of the property of the testator. The Defendants stated in their answer that they claimed under no charge made by the tenant for life, but under a lease at a rack rent which he had granted to a lessee, who had mortgaged the lease to them. The Plaintiff excepted to the answer because the Defendants did not set forth the date of the lease:—

Held (affirming the decision of *Malins*, V.C.), that the Plaintiff, being a trustee, was entitled to know the particulars of those who claimed to be his *cestuis que trust*; and the exceptions must therefore be allowed.

THIS was an appeal from a decision of Vice-Chancellor *Malins* allowing exceptions to the answer of the Defendants, the trustees of the *Birkbeck Permanent Building Society*.

I. B. Hurst, by his will, dated the 23rd of September, 1867, gave all his freehold and leasehold property to the Plaintiff, *J. W. Hurst*, and his wife, who was a defendant, upon trust to permit his daughter *Margaret Dennant* to receive the rents and profits of certain freehold and leasehold property for her separate use during her life, and after her death to assign the same property to her children equally at the age of twenty-one; and upon trust to permit his son, the Defendant *I. B. Hurst*, to receive the rents and profits of certain other freehold and leasehold property for his life, and after his death to assign the same between his children equally at the age of twenty-one; and in case he should have no children who should attain that age, then in trust for such of the children of Mrs. *Dennant* as should attain that age. And the will contained the following clause: "And it is my

wish that the bequests hereinbefore made to my said son and daughter respectively shall be subject to the following conditions: (that is to say) that they shall in nowise charge or incumber the said freehold or leasehold property, the rents of which are receivable by them during their respective lives, or any part thereof, nor cause any question or dispute to arise with reference to the said property or my disposal thereof as aforesaid; and in case either my said son or daughter shall so charge or incumber the said property, or any part thereof, or raise any question or dispute as aforesaid, or in case my said son shall become bankrupt or insolvent or compound with his creditors, then the bequest to my said son or daughter so transgressing such conditions, or in case of the bankruptcy or insolvency of my said son as aforesaid, shall thereupon become absolutely forfeited. And it is my wish that in either of such cases the trusts hereinbefore created after the determination of the trusts in favour of my said son or daughter so transgressing shall at once take effect, and be acted upon by my said executors and trustees as hereinbefore directed."

In 1872 the Plaintiff filed his bill against the testator's widow for the administration of the trusts of the will, and the usual decree for administration was made, and a receiver was appointed of the rents and profits of the property devised to *I. B. Hurst.*

In January, 1874, the Plaintiff filed the present bill, which was supplemental to the original bill, alleging that the tenants refused to pay the rents to the receiver, on the ground that the trustees of the *Birkbeck Permanent Building Society* were in the habit of receiving them; and that the trustees claimed to have some interest in the testator's estate by virtue of a charge or incumbrance in their favour by the Defendant *I. B. Hurst*, but that he was advised that such charge or incumbrance was wholly inoperative, except for the purpose of creating a forfeiture and accelerating the remainders to the children of *I. B. Hurst* and *Margaret Dennant;* and he also made a similar charge respecting an alleged charge created by *I. B. Hurst* in favour of the Defendant *R. A. Ward.* The Plaintiff interrogated the trustees of the *Birkbeck Building Society*, calling upon them to set forth the full particulars of all securities given to the society, or to any person or persons on behalf of it, or to the Defendants, or any of them, by the Defen-

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dant *I. B. Hurst*, or any person on his behalf, or transferred to the said society, &c.; and also full particulars of all charges or claims on the real and leasehold estates devised by the testator's will to the Defendant *I. B. Hurst*.

The trustees of the *Birkbeck Permanent Building Society* in their answer stated that, by an indenture of mortgage dated the 26th of August, 1870, *C. Sidgreaves* demised certain parts of the property devised to *I. B. Hurst*, and which had been demised to *Sidgreaves* at a rack rent, for twenty-one years, "by a certain lease thereinmentioned and made between *I. B. Hurst* of the one part, and the said mortgagor of the other part," to the trustees by way of mortgage for securing the payment of the fines, &c., due to the society; and they claimed the benefit of the doctrine of the Court of Equity affording protection to purchasers for value without notice. The trustees denied that any security had been given to the society by *I. B. Hurst*, or transferred to them by any one claiming title through him, but said that they were mortgagees of the leasehold interest of *C. Sidgreaves* in part of the devised estate.

The Defendant *Ward* put in an answer stating that *I. B. Hurst* had, by an agreement dated the 30th of September, 1869, charged his interest under his father's will with the repayment of £100 advanced by him, and had also executed an assignment to him of the same property, dated the 5th of May, 1870; but he disclaimed all interest in the property, being advised that the charge created a forfeiture of *I. B. Hurst's* interest.

The Plaintiff excepted to the answer of the trustees of the *Birkbeck Building Society*, on the ground that they had not set forth the date of the lease to *Sidgreaves* under which they claimed, and the Vice-Chancellor allowed the exceptions. The Defendants appealed from this decision.

Mr. *Cotton*, Q.C., and Mr. *Hemings*, for the Appellants:—

The lease granted to *Sidgreaves*, under which we claim, was on the face of it perfectly valid, being granted for twenty-one years and at a rack rent, and the Plaintiff can only challenge our title by shewing that *I. B. Hurst* had forfeited his interest before he granted it. If he desires to do this he must shew how the forfeiture arose, and cannot call upon us to assist him by telling him

the date of our lease. It is well established that a Defendant need not answer a question which exposes him to a forfeiture of his estate. The allegation in the bill is, that we claim under a charge or incumbrance created by *I. B. Hurst* which is void under the forfeiture clause, and the Plaintiff sets up no other case against us. We deny that we claim under any such charge, and he has no right to interrogate us further for the purpose of finding some flaw in our title which he does not set up in the bill.

Moreover, we claim the protection of the Court as purchasers for value without notice; and that protection extends to discovery as well as to relief.

Mr. *Cookson* (Mr. *Glasse*, Q.C., with him), for the Plaintiff:—

The determination of the estate of the trust for life on violating the condition is not strictly a forfeiture, though it may be called so in the will. It is a conditional limitation by which the estate is given to him for life until he shall attempt to charge it, and then over: *Rochford* v. *Hackman* (1). It is exactly like a gift to a widow during her widowhood, and it is well settled that in such a case the widow cannot refuse to answer whether she has married again: *Chauncey* v. *Tahourdin* (2); *Lucas* v. *Evans* (3); *Hambrook* v. *Smith* (4). With respect to the defence of purchase without notice, the Plaintiff is the trustee holding the legal estate, and the original bill was filed for the administration of the trusts of the will. The trustee has a right to know who his *cestuis que trust* are, and under what right they claim.

Mr. *Cotton*, in reply:—

The bill is not filed against us as *cestuis que trust* of the Plaintiff, but as persons claiming adversely to the trust. Although we have not the legal estate, we are entitled to the protection of the Court as *bonâ fide* purchasers.

SIR W. M. JAMES, L.J.:—

This appears to me a case resting on first principles. I do not

(1) 9 Hare, 475.
(2) 2 Atk. 392.
(3) 3 Atk. 260.
(4) 17 Sim. 209.

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think that anything turns on the plea of purchase for value without notice, or on the rules of the Court concerning forfeiture. Trustees are entitled to know to whom they are to pay the rents. In this case the trustee says that certain Defendants claim under incumbrances which created a forfeiture. The Defendants answer that they do not claim under any such incumbrance, but that they claim under a valid lease from the tenant for life. The trustee has a right to know the title of those who pretend to be his *cestuis que trust*. The Defendants might have said they claim no interest at all; but if they do claim an interest they must tell the trustee how they acquired that interest. The appeal must be dismissed with costs.

SIR G. MELLISH, L.J., concurred.

Solicitors for the Plaintiff: Messrs. *Mercer & Mercer*.
Solicitor for the Defendants: Mr. *Poncione*.

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25 & 26 *Vict. c.* 89, *ss.* 12, 50, 51—*Judgment at Law.*] By an agreement between two companies, one company was to buy the business of the other company, the consideration to be paid in shares of the buying company, to be issued to the selling company and divided amongst its shareholders. Resolutions approving of this agreement and also authorizing the creation of the requisite new shares (all the shares authorized by the articles of association having been already issued) were passed at one extraordinary general meeting of the buying company, and were confirmed at a second meeting. A large majority of the shareholders of the selling company assented to the agreement, and applied for and received what purported to be new shares of the buying company. Certain dissentient shareholders, however, filed a bill in Chancery and obtained a decision from *Giffard*, V.C., that the agreement was void. These shareholders were afterwards, by way of compromise, paid a sum of money by the official liquidator of the buying company, then in liquidation, and the suit in Chancery was stayed. Certain former shareholders of the selling company, holders of what purported to be new shares in the buying company, then applied to be repaid the money which they had paid to the buying company for premium and on calls upon their shares:—*Held*, that as the buying company did really acquire (by a title which, though originally defective as against the dissentient shareholders, had been in the end confirmed) the property of the selling company, and as the shares were issued *bonâ fide*, the holders of the new shares could not now repudiate them:—*Held*, that the directors of a company, after a resolution to increase the capital of a company by the issue of new shares has been approved of by two meetings, according to sects. 50 and 51 of the *Companies Act*, 1862, can proceed to issue the shares; and that it is not necessary, under sect. 12, to have the articles varied at two meetings and the issue of the shares authorized by two other meetings.—Order of *Wickens*, V.C., discharged.—The buying company had brought against one of the holders of new shares an action to recover calls, in which action judgment had been given for the Defendant:—*Held*, that the judgment was conclusive; and that this holder of shares must be repaid what he had paid for premium and calls

AMALGAMATION OF COMPANIES—*continued.*
on the shares.—Order of *James*, L.J., affirmed.—*Bank of Hindustan* v. *Alison* (Law Rep. 6 C. P. 222) discussed. *In re* Bank of Hindustan, China, and Japan. Campbell's Case. Hippisley's Case. Alison's Case - - - 1

2. —— *Contributory—Application for Shares—Acceptance—Confirmation.*] An arrangement was made for an amalgamation between two companies. A holder of half paid-up shares in the selling company applied, according to the terms of the arrangement, for half paid-up shares in the buying company, and received an answer that shares had been allotted to him, credited with the proportionate part of the net assets of the selling company. His name was placed on the register of shareholders. He afterwards applied for the certificates of his shares, but never received them. The buying company was afterwards wound up, and the amalgamation was decided to be void:—*Held*, that as the answer to his letter of application contained fresh terms, those two letters did not constitute a contract to take shares; and that his application for the certificates did not amount to an acceptance of the fresh terms.—Order of *Bacon*, V.C., refusing to put the name of the shareholder on the list of contributories, affirmed. *In re* United Ports and General Insurance Company. Beck's Case - - - 392

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APPARENT POSSESSION—*Bankruptcy—Bills of Sale Act* (17 & 18 *Vict. c.* 36), *s.* 7—*Packing up Goods.*] A mortgagee under an unregistered bill of sale of furniture and live stock at a house, sent two men into the house on the 10th of February to take possession of the goods. They remained in the house, but allowed the debtors and their family to use the goods as usual till the 14th of February. On the 11th of February the debtors executed another bill of sale, which comprised substantially all their property, to another creditor, to secure an antecedent debt. Early in the morning of the 14th of February the first mortgagee sent vans to the house, and the men in possession commenced to pack the furniture and load the vans. At half-past twelve o'clock on the same day the debtors filed a petition for liquidation. The furniture and live stock at the house were carried away by the first mortgagee before the evening:—*Held* (reversing the decision of the Chief Judge in Bankruptcy), that the furniture and live stock were in the apparent possession of the debtors until the morning of the 14th of February, within the 7th section of the *Bills of Sale Act* (17 & 18 Vict. c. 36), but ceased to be so when the men in possession began to pack the goods and put them in the vans; and that as the debtors committed an act of bankruptcy on the 11th by the assignment of all their property, the first bill of sale was void as against the trustee in the liquidation, and the trustee was entitled to the proceeds of the sale. *Ex parte* Jay. *In re* Blenkhorn - - - - - 697

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ASSIGNMENT OF ALL DEBTOR'S PROPERTY—*Bankruptcy—Previous Agreement to give an Assignment on Demand—Bills of Sale Act—Bankruptcy Act*, 1869, *s.* 6.] Two traders, brothers, obtained advances amounting to £500 from their father and brother in various sums, and in 1870, on the last advance of £250 they signed an agreement that they would, on demand, assign the lease of their premises and their business, stock-in-trade, and book debts to the creditors, with a proviso that if they should repay the sums advanced the agreement should be void, but if they should fail to do so a valuation should be made, and the balance, if any, should be paid to the debtors. At the same time the lease was deposited with the same creditors as a security for the due performance of the agreement. In 1873 the debtors became embarrassed, and the creditors demanded the execution of an assignment in pursuance of the agreement, which was accordingly executed, and the balance of the valuation of the property, amounting to £123, was paid to the debtors. The assignment included substantially the whole of the debtors' property, and the creditors took possession of it forthwith. A few days afterwards the debtors filed a petition for liquidation, and the trustee applied to have the deed of assignment of 1873 declared void:—*Held*, that the agreement of 1870 became a binding security on demand being made, and that the assignment of 1873, being based upon it, was valid. *Ex parte* Izard. *In re* Cook - - - 271

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AUTHORITY OF DIRECTORS—*Delegated Power—Purchase of Shares—Manager—Notice—Execution of Transfer.*] The directors of a company having under the articles of association power to buy shares in the company and to appoint a manager, appointed a manager. A shareholder agreed with the manager for the sale to the company of his shares, and executed a transfer of his shares to two directors who were trustees for the company. The transfer was not executed by the two directors, but was registered:—*Held*, that the directors had no authority to delegate to a manager the power to buy shares:—*Held*, on the facts, that the directors had not delegated that power, or ratified the transaction with the shareholder:—*Held*, that the directors were not considered to have such knowledge of the books of the company as to be affected with knowledge of the transaction:—*Held*, that the transfer was invalid, and that the shareholder was a contributory.—Decision of the Vice-Chancellor of the County Palatine of *Lancaster* affirmed. *In re* COUNTY PALATINE LOAN AND DISCOUNT COMPANY. CARTMELL'S CASE - - - - - 691

AUTHORITY OF PARTNER—*Bills of Exchange—Liability of Firm.*] Four firms, *F. & Co., M. & Co., M. & L.*, and *A. & Co.*, associated themselves in a trading adventure, under an agreement which provided "that the finance of the business be carried on by acceptances of the several parties interested as may from time to time be arranged." The association was not registered, nor was its existence made known to the world, though it was known as the *A. F. Company* among its members. The adventure had, before the association was formed, been carried on by *F. & Co.*, in whose name it continued to be carried on. An order having been made for winding up the association, an application was made to prove on ten bills of exchange, drawn by *M. & Co.* for the purposes of the adventure, and accepted some by *F. & Co.*, some by *M. & L.*, and some by *A. & Co.*:—*Held* (reversing the decision of *Malins*, V.C.), that the proof could not be admitted, for that the bills bound only the individual firms by which they were drawn and accepted. *In re* ADANSONIA FIBRE COMPANY. MILES' CLAIM - - 635

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nership Business—Bankruptcy Act, 1861, *s.* 137—*Bankruptcy Act*, 1869, *s.* 72—*Alleged Misconduct of Assignee—Bill by Purchaser offering to give up his Purchase on being repaid his Purchase-money and Interest.*] One of the partners in a distillery business filed a bill in Chancery against his co-partners for the dissolution of the partnership, and a decree was made for a dissolution, and afterwards an order was made for a sale of the business and property as a going concern by public auction. During the progress of the suit the Plaintiff became bankrupt, and the creditors' assignee sold the bankrupt's interest in the partnership property to his co-partners, and procured an order of the Court of Chancery sanctioning the sale. The co-partners then sold the whole business to a purchaser, and the creditors were paid 20*s.* in the pound out of the purchase-money. New assignees were afterwards appointed, who obtained an order in the Court of Bankruptcy, at the instance of the bankrupt, to set aside the sales as being made collusively, and at an undervalue: —*Held*, on appeal (reversing the order of the Chief Judge), that there was no breach of trust on the part of the assignee in selling the share of the bankrupt partner by private contract, and that there was no proof of collusion in obtaining the order for sale; but it appearing to the Court that the valuation of the property for the purpose of the sale had in some respects been made on an erroneous principle, a reference was directed as to the true value of the property, the purchaser consenting to pay any excess which might be found due from him on such reference:—*Held*, also, that the 137th section of the *Bankruptcy Act*, 1861, does not apply to a sale of a bankrupt's interest in a partnership of which some of the partners are solvent:—*Held*, also, that the 72nd section of the *Bankruptcy Act*, 1869, does not enable the Court of Bankruptcy to draw within its jurisdiction property or the owners of property not vested in the trustee, and not originally subject to the administration in bankruptcy; and *à fortiori* does not authorize that Court to work out a decree which has been made in Chancery against such persons. *In re* MOTION. MAULE *v.* DAVIS 192

BANKRUPTCY OF MARRIED WOMAN—*Married Woman's Property Act* (33 & 34 *Vict. c.* 93), *s.* 12—*Separate Estate—Debt before Marriage.*] A married woman was sued at law by a creditor for a debt contracted by her before her marriage, which took place in 1872, and a judgment was obtained against her. The creditor then sued out a debtor's summons, and, the debt not being satisfied, filed a petition for adjudication of bankruptcy against her. She had no separate property:—*Held*, that the married woman could not be adjudicated a bankrupt.—*Per Mellish*, L.J.:—Whether a married woman can be made a bankrupt if she has separate property—*Quære*. *Ex parte* HOLLAND. *In re* HENEAGE - - 307

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BILL SENT BY POST—*Bankruptcy—Bill of Exchange—Indorsement—Property in Letter—Rules of French Post Office—Recovery of Letter by Sender—Revocation of Delivery—Mistake.*] The rules of the French Post Office permit a person who has posted a letter to recover it at any time before it is despatched from the office where it is posted on complying with certain forms. Therefore, where a letter containing bills of exchange, indorsed to the person to whom the letter was addressed, was posted in a French post office:—*Held*, that the property in the bills did not pass to the indorsee till the letter had left the office where it was posted.—*C.*, a banker at *Lyons*, having received from *D.* a bill drawn on a firm in *Milan*, posted a letter addressed to *D.* in *England*, inclosing five bills of exchange indorsed to him. Before the mail left *Lyons*, *C.* received a telegram from *D.'s* agent at *Milan*, stating that the drawee of the bill refused to accept it, and telling him not to send any remittance to *D.* *C.* accordingly applied to the post office for a return of the letter containing the five bills; but through a mistake of his clerk the letter was not returned to him, but was despatched to *England* and delivered to *D.*, who soon afterwards filed a petition for liquidation:—*Held*, that as *C.* had shewn an intention of recalling the letter before it left *Lyons*, which had only been frustrated by a mistake of his clerk, the property in the bills did not pass to the indorsee, and that they must be given up to *C.*:—*Held*, also, by *Mellish*, L.J., that even if the property in the bills had passed where the letter was posted, the delivery of the bills was revoked by both parties, and that the fact of their not actually getting back into the manual possession of the indorser through a mistake of the clerk made no difference. *Ex parte* COTE. *In re* DEVEZE 27

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BROKER'S COMMISSION — *Agent — Commission from other side—Charges—Insurance—Negligence —Remedy at Law.*] A marine insurance company in *New York* appointed a firm of merchants in *London* their agents for settling claims in *England* and for effecting re-insurances. For settling the claims the agents were to receive a fixed percentage, but nothing was provided as to remuneration for re-insuring. According to the custom as between underwriters and brokers, the agents were allowed by the underwriters 5 per cent. on each re-assurance; and also at the end of the year, on the general balance between the underwriter and the broker, 12 per cent. on the profits of the year, if there were profits. The firm in *London* were in the habit of receiving both these percentages, but only the 5 per cent. was mentioned in their accounts sent to the insurance company. The company discovered this in 1866, but made no objection to it until 1868. In 1869 the company filed a bill against the firm in *London* for an account in which the 12 per cent. should be accounted for; claiming also repayment of certain sums as interest; and praying that the firm in *London* might in the account be held liable for neglect in not re-insuring a certain vessel:—*Held*, that under the circumstances the firm in *London* were entitled to retain the 12 per cent. received by them as remuneration; and were also entitled to the interest charged by them:—*Held*, further, that the loss sustained by the alleged neglect of the firm in *London* could only be recovered at law; and that the bill must therefore be dismissed.—Decree of *Bacon*, V.C., reversed. GREAT WESTERN INSURANCE COMPANY *v.* CUNLIFFE - - - 525

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—— Farm-house—Proceeds of sale of timber—Settled Estates Act - - 681
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See QUALIFICATION OF DIRECTOR.

—— *Ambler* v. *Bolton* (Law Rep. 14 Eq. 427) distinguished - - - - 336
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—— *Bank of Hindustan* v. *Alison* (Law Rep. 6 C. P. 222) discussed - - 1
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—— *Blodwell* v. *Edwards* (Cro. Eliz. 509) considered - - - - 147
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—— *Carter* v. *Carter* (Law Rep. 8 Eq. 551) approved - - - - 97
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—— *Daglish, Ex parte* (Law Rep. 8 Ch. 1072) distinguished - - - 576
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—— *Deere* v. *Guest* (1 My. & Cr. 516) considered
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—— *Dickinson* v. *Dillwyn* (Law Rep. 8 Eq. 546) approved - - - - 97
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—— *Durell* v. *Pritchard* (Law Rep. 1 Ch. 244) explained - - - - 212
See DAMAGES UNDER CAIRNS' ACT.

—— *Edwards* v. *Edwards* (15 Beav. 357) approved [45
See DEATH COUPLED WITH A CONTINGENCY.

—— *Hill* v. *Crook* (Law Rep. 6 H. L. 265) considered - - - - 147
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—— *Holt* v. *Sindrey* (Law Rep. 7 Eq. 170) considered - - - - 147
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—— *James* v. *Lichfield* (Law Rep. 9 Eq. 51) considered - - - - 447
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—— *Leeke's Case* (Law Rep. 6 Ch. 469) explained
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—— *Lingard* v. *Messiter* (1 B. & C. 308) followed
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—— *Lingham* v. *Biggs* (1 B. & P. 82) followed
See ORDER AND DISPOSITION. 3. [621

—— *Lowndes* v. *Bettle* (33 L. J. (Ch.) 451) followed
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—— *Macredie, Ex parte* (Law Rep. 8 Ch. 535) considered - - - - 686
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—— *Metham* v. *Earl of Devon* (1 P. Wms. 529) considered - - - - 147
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—— *Morley, Ex parte* (Law Rep. 8 Ch. 572) distinguished - - - - 572
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—— *Pratt* v. *Mathew* (22 Beav. 328) considered
See ILLEGITIMATE CHILDREN. [147

—— *Rex* v. *Russell* (6 B. & C. 566) disapproved
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—— *Slater* v. *Pinder* (Law Rep. 6 Ex. 228) considered - - - - 432
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—— *Smart, Ex parte* (Law Rep. 8 Ch. 220) distinguished - - - - 561
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—— *Steven* v. *Van Voorst* (17 Beav. 305) overruled - - - - 97
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—— *Watkins, Ex parte* (Law Rep. 8 Ch. 520) followed - - - - 602
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—— *Wills* v. *Bourne* (Law Rep. 16 Eq. 487) followed - - - - 316
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COMMISSION—Broker - - - 525
See Broker's Commission.

COMMISSION OF INQUIRY—*Church Discipline Act* (3 & 4 *Vict. c.* 86)—*Clerk in Holy Orders—Status of Applicant—Bishop.*] The bishop is not, before issuing a commission of inquiry into charges against a clerk in holy orders, obliged to hear objections against the person who has made the application to the bishop.—*Quære*, whether the bishop has a discretion on account of the character of the promoter, to refuse to issue a commission of inquiry.—Order of *Bacon*, V.C., affirmed. *Ex parte* Edwards - - - - 138

COMMISSIONERS FOR REDUCTION OF NATIONAL DEBT—*Grant of Life Annuities*—10 *Geo.* 4, *c.* 24—*Misrepresentation as to Age—Contract void ab initio—Power of Commissioners to rectify Contract.*] In 1843 a grant of an annuity was made by the Commissioners for the Reduction of the National Debt, under the 10 Geo. 4, c. 24, to a life assurance company on the life of *C.*, who was certified by the company to be of the age of sixty-four years. After the death of *C.* in 1869, it was discovered that a misrepresentation of his age had been made by the company:—*Held* (affirming the decision of *Hall*, V.C.), that the Commissioners were entitled to have the contract declared void *ab initio*, although the misrepresentation was not intentional; and the money paid on both sides was ordered to be repaid with simple interest at 4 per cent. The statute 10 Geo. 4, c. 24, contained a clause empowering the Commissioners to rectify any contract in case of the discovery of an accidental error:—*Held*, that this clause was not compulsory, and that the Court had no jurisdiction to interfere with the discretion of the Commissioners if they declined to exercise their power of rectification, and claimed to have the contract set aside. Attorney-General *v.* Ray - - - - - - - 397

COMMITTEE OF INSPECTION—Liquidator—Removal - - - - 506
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—— Majority of shareholders—Power to bind minority - - - - 350
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—— Property abroad—Winding-up - 557
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—— Public officer — Debtor's summons — Affidavit - - - 298, 324
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—— Qualification of director - - 102
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—— Reduction of capital—Special meetings 11, n.
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—— Subscriber of memorandum - - 60
See Subscriber of Memorandum.
—— Surrender of shares - - - 54
See Surrender of Shares.
—— Transfer of shares - - - 257
See Transfer of Shares.
—— Transfer to infant — Father buying in his son's name - - - - 414
See Infant Transferee.
—— Winding-up—Costs of official liquidator
See Official Liquidator. 2. [553

COMPENSATION UNDER ELEMENTARY EDUCATION ACT, 1870—*School Board—Building—Injuriously affected*—33 & 34 *Vict. c.* 75, *ss.* 19, 20.] A School Board, taking lands under the *Elementary Education Act*, 1870, need not give notice to treat to the owners of easements over the land taken; but compensation in respect of such easements is to be given as for land injuriously affected.—Decision of *Malins*, V.C., reversed. Clark *v.* School Board for London - 120

COMPLETION OF BUILDING — Mandatory injunction - - - - 214, n.
See Mandatory Injunction. 2.

COMPOSITION WITH CREDITORS — Clause inserted in resolution for liquidation 583
See Meeting of Creditors. 2.
—— Motive of kindness towards debtor - 290
See Meeting of Creditors. 1.

COMPROMISE—Action by infant - - 414
See Infant Transferee.

CONCURRENT SUITS — *Practice — Transfer of Cause.*] The trustees of a marriage settlement filed a bill to have the trusts carried into execution, and marked the cause for *Malins*, V.C. A few weeks

CONCURRENT SUITS—*continued.*
afterwards the husband and wife filed a bill to have the settlement set aside, or rectified in a way which would give the wife entire control over the fund. This cause was marked for the Master of the Rolls. The trustees applied to have the second cause transferred to the Court of *Malins*, V.C.:—*Held*, that the second bill ought to have been filed in the same Court as the first, and that the Plaintiffs in the second cause must pay the costs of the application to have it transferred to the Vice-Chancellor, and that regard could not be had to the circumstance that the arrear of causes before the Vice-Chancellor was very heavy. SAYERS *v.* CORRIE. CORRIE *v.* SAYERS. - 52

2. —— *Practice—Transfer of Cause—Costs.*] As a general rule a suit instituted in one branch of the Court when a suit as to the same matter is pending in another branch will be tansferred to the latter, and the Plaintiff in the second suit will have to pay the costs of the transfer. But the Plaintiff in the first suit ought, before giving notice of motion for transfer, to ask the Plaintiff in the second suit for his consent to the application; and if the Plaintiff in the first suit neglects to do so he may have to pay the costs of the application. LYALL *v.* WELDHEN - - 287

CONDITION—Void—Unlawful cohabitation 670
See DEBT CAPABLE OF BEING ESTIMATED.

CONFLICT OF LAWS—Deposit of English deeds with German firm - - - 722
See DEPOSIT OF DEEDS.

CONSENT—Lessor—Assignment or underlease 729
See COVENANT NOT TO ASSIGN.

CONSERVATORS OF RIVER—Duty of - 423
See OBSTRUCTION OF NAVIGATION.

CONS. ORD. XXIII. r. 28 - - - 269
See INROLMENT OF DECREE. 2.

CONSTRUCTIVE NOTICE—*Occupation—Partnership—Tenants in Common.*] *C.* and *B.*, tenants in common in fee, in equal shares, of a messuage and premises, entered into partnership, and it was agreed by the articles that this property should be partnership assets; and it became the place where the business of the firm was carried on. After this *B.* made a legal mortgage in fee of one moiety to secure his private debt to a person who knew that the property was the place of business of the firm. Some years afterwards *B.* absconded, and *C.* was obliged to pay the debts of the firm, all of which had been contracted since the mortgage, and a large balance thus became due to him:—*Held*, that as the mortgagee, when he took his security, knew that the firm was in possession of the property, he had constructive notice of the title of the partnership, and that his claim must be postponed to that of *C.*; and that the circumstance of the debts paid by *C.* having been incurred since the mortgage did not affect the case. CAVANDER *v.* BULTEEL - - - 79

CONSTRUCTIVE TRUSTEE—*Breach of Trust—Complicity in Breach of Trust—Solicitor, Liability of—Appointment of sole Trustee who misapplies Funds—Costs, adding Defendants for.*] A stranger who acts as the agent of a trustee in a transaction legally within his power, but which leads to a breach of trust, is not to be held responsible as a constructive trustee unless some of the property passes into his hands, or unless he is cognizant of a dishonest design on the part of the trustee. The Court discourages the practice of making solicitors or other agents who are not primarily liable for the loss of property, and who ought to be made witnesses, Defendants to a suit for the purpose of charging them with costs. *A.*, the surviving trustee of a fund, one moiety of which was settled upon his wife and children, and the other moiety upon the wife and children of *B.*, in exercise of a power in the settlement, appointed *B.* sole trustee of half the fund, taking an indemnity from him, and retained the other half in his own name. *B.* sold out and misapplied the moiety of the fund transferred to him, and became bankrupt. *A.'s* solicitor advised him against the appointment of *B.* as sole trustee, but prepared the deeds of appointment and indemnity, and introduced him to a broker for the purpose of selling out some of the stock to pay some costs to which it was liable, and the same broker afterwards transferred a moiety of the residue to *B.* *B.* employed another solicitor, who warned *B.'s* wife of the risk attending the proposed transaction, but settled the deed of indemnity on her behalf:—*Held* (affirming the decision of *Wickens*, V.C.), in a suit by *B.'s* children, seeking to make *A.* and the two solicitors responsible for the fund which was lost, that as neither of the solicitors had any knowledge of, or any reason to suspect, a dishonest design in the transaction, and as the fund had not passed into their hands, the bill must be dismissed against them both with costs. BARNES *v.* ADDY. 244

CONTINUOUS ACTS—Specific performance—Use of standing signals - - 331
See SPECIFIC PERFORMANCE—CONTINUOUS ACTS.

CONTRACT—Counts in, joined with counts in tort—Action against liquidating debtor 673
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—— Joint—Death of one contractor - 336
See JOINT CONTRACT.

—— Paid-up shares - - - - 554
See CONTRACT FOR PAID-UP SHARES.

—— Personal—Enforced against trustee in bankruptcy - - - - 722
See DEPOSIT OF DEEDS.

—— Void *ab initio*—Policy of assurance—Misrepresentation - - - 397
See COMMISSIONERS FOR REDUCTION OF NATIONAL DEBT.

CONTRACT FOR PAID-UP SHARES—*Issue of Shares—Certificate—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.] A company agreed to purchase property for paid-up shares, and accordingly the directors passed a resolution to allot a corresponding number of shares to the vendors and their nominees. Two months afterwards, the agreement between the vendors and the company was filed with the Registrar of Joint Stock Companies. One of the nominees had sold twenty of the shares, and the transfer was registered three days before the agreement had been filed, but no certificate as to these shares was issued until a fortnight afterwards:—*Held*, that the shares were not issued within the meaning of

CONTRACT FOR PAID-UP SHARES—*continued.*
the *Companies Act*, 1867 (30 & 31 Vict. c. 131), s. 25, until the certificate was issued, and that they were paid-up shares in the hands of the purchaser.—Order of *Bacon*, V.C., affirmed. *In re* IMPERIAL RUBBER COMPANY. BUSH'S CASE 554

CONTRACTOR—Railway—Money paid for getting contract - - - - 33
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CONTRIBUTORY—Amalgamation of companies [1, 392
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—— Paid-up shares—Contract for - - 554
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—— Paid-up shares—Payment by money's worth [355
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—— Qualification of director - - 102
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—— Rectification of register - - 664
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—— Sale of shares to manager of company 691
See AUTHORITY OF DIRECTORS.

—— Subscriber of memorandum - - 60
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—— Surrender of shares - - - 54
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—— Transfer of shares - - - 257
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—— Transfer to infant - - - 414
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—— Transfer of cause - - 52, 287
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—— Trustee in bankruptcy - - 479
See TRUSTEE IN BANKRUPTCY.

COSTS OF LIQUIDATION—*Subsequent Bankruptcy—Bankruptcy Rules*, 1870, *r.* 292.] A liquidation by arrangement was rejected by the creditors, but a receiver appointed under the liquidation remained in office when the debtor was adjudged a bankrupt:—*Held*, that the proceedings in liquidation were pending so as to enable the Court, under rule 292 of the *Bankruptcy Rules*, 1870, to direct the trustee of the bankruptcy to pay the costs of the liquidation.—Order of *Bacon*, C.J., affirmed. *In re* HAWES. *Ex parte* JEFFERY 144

COSTS UNDER LANDS CLAUSES ACT, ss. 80, 85—*Deposit—Costs.*] Where a company has, under sect. 85 of the *Lands Clauses Act*, taken possession of land before agreement, upon giving a bond and depositing money in Court, it is entitled, upon fulfilling the conditions of the bond, to have the money repaid, and the Court cannot, under sect. 80, order payment of costs out of it:—*Per Mellish*, L.J.:—Sect. 80 only authorizes the Court to make an order on the company to pay costs, not an order to pay them out of any particular fund. *In re* NEATH AND BRECON RAILWAY COMPANY - - - - - - 263

COURSE OF BUSINESS—Payment in - 752
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COVENANT—Not to assign - - - 729
See COVENANT NOT TO ASSIGN.

—— Quiet enjoyment—Easement - - 463
See LIGHT AND AIR.

—— To settle future property - - 97
See COVENANT TO SETTLE.

COVENANT NOT TO ASSIGN—*Lease—Assignment—Consent—Under-lease—License.*] The lease of certain mines contained a covenant that the lessee should not, without the consent of the lessor, let or assign the mines. The lessor granted to the lessee a license to sub-let a part, but the license provided that this should not authorize any further letting or assigning of the part of the mines, the subject of the license, without such consent as was required by the lease. The lessee then agreed to sub-let to an under-lessee the part of the mines the subject of the license, the under-lease to contain provisions in all respects like those in the original lease:—*Semble*, that neither under the lease nor under the license would the under-lessee be prevented from letting or assigning without the consent of the original lessor:—*Held*, that according to the agreement the under-lease ought to contain a covenant by the under-lessee against letting or assigning without the consent of the lessee, and not a covenant against letting or assigning without the consent of the lessor.—Order of *Bacon*, V.C., reversed. WILLIAMSON *v.* WILLIAMSON - - - 729

COVENANT TO SETTLE—*Marriage Settlement—Future Property of Wife.*] In a marriage settlement a covenant to settle the wife's after-acquired property will, in the absence of expressions shewing a contrary intention, be construed as applying only to property acquired during the coverture, although the words "during the said intended coverture" are omitted.—*Dickinson* v. *Dillwyn* (Law Rep. 8 Eq. 546) and *Carter* v. *Carter* (Law Rep. 8 Eq. 551) approved.—*Stevens* v. *Van Voorst* (17 Beav. 305) overruled. *In re* EDWARDS (A PERSON OF UNSOUND MIND). *In re* LONDON, BRIGHTON, AND SOUTH COAST RAILWAYS ACT 97

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—— Holding security—Deposit of English title deeds with German firm - - 722
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—— Holding security—Payment into Court—Bill of Exchange Act - - - 379
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—— Meeting of creditors—Liquidation by arrangement - - - 290, 583
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CREDITOR—*continued.*
—— Motive of kindness towards debtor - 290
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CREDITOR HOLDING SECURITY—*Action on Bill of Exchange—Payment of Money into Court to abide the event—Bankruptcy of Defendant—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 16 (*sub-s.* 5), 72—*Bills of Exchange Act*, 1855 (18 & 19 *Vict. c.* 67), *s.* 2.] An action upon an overdue bill of exchange for £1200 was brought against the acceptors. The Defendants obtained leave to appear and defend the action upon paying into Court £880 to abide the event. An order was afterwards made referring the matter in dispute to arbitration. Before any award was made the Defendants filed a liquidation petition. The trustee claimed the £880 for distribution among the creditors generally, and obtained an order from the County Court restraining further proceedings in the arbitration:—*Held* (affirming the decision of *Bacon*, C.J.), that the Plaintiff in the action was, at the commencement of the liquidation, a secured creditor, and that an inquiry must be directed in the Court of Bankruptcy to ascertain to how much of the £880 he was entitled. *Ex parte* BANNER. *In re* KEYWORTH - 379

CROSS ACCEPTANCES—*Accommodation Bills—Claim in Winding-up — Mistake — Amount — Balance — Security realized.*] A merchant in *Bombay* bought of a bank bills on their *London* branch for £25,000, giving for them £5000 in cash and £20,000 in bills on a firm in *London*, consisting of himself and another person. The bank bills were all indorsed to the firm in *London*, and were all accepted. The merchant's bills were sent to the *London* branch of the bank and were accepted by the *London* firm. The bank was wound up, and the merchant and his partner each became insolvent; the *London* firm holding at the time of the winding-up bills to the amount of £19,000, and the bank having parted with the bills for £20,000:—*Held*, that under the circumstances the bills were not accommodation bills, and that the trustees of the *London* firm were entitled to prove for the £19,000 in the winding-up:—*Held*, also, that the principle as to proving for cross accommodation bills does not apply when the bills are in the hands of third parties.—The trustees of the *London* firm had sent in a previous claim to prove for £5000, taking that amount as the balance between the bills for £25,000 and the bills for £20,000, and not being aware that the bank had parted with the bills for £20,000. At the time of the previous claim the trustees held securities which had since been realized by them:—*Held*, that, notwithstanding the previous claim made by mistake, the trustees might prove for the £19,000; and that the claim would be considered as made when the previous claim was made, so that the trustees representing the *London* firm were not bound to give credit for the money received by realizing the security.—Order of *Hall*, V.C., affirmed. *Ex parte Macredie* (Law Rep. 8 Ch. 535) considered. *In re* LONDON, BOMBAY, AND MEDITERRANEAN BANK. *Ex parte* CAMA - - - - - - 686

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—— Specific performance—Agreement to construct works - - - 279
See SPECIFIC PERFORMANCE—CONSTRUCTION OF WORKS.

DAMAGES UNDER CAIRNS' ACT—*Mandatory Injunction—Light and Air.*] It is not to be laid down as a general rule that, where a building injuriously affecting ancient lights has been completed before the bill is filed, the Court is unable to give damages unless the injury is such as would justify a mandatory injunction.—*Durell* v. *Pritchard* (Law Rep. 1 Ch. 244) explained. CITY OF LONDON BREWERY COMPANY *v.* TENNANT - 212

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DEATH—Partnership—Bankruptcy of survivors
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—— Without issue - - - - 45
See DEATH COUPLED WITH A CONTINGENCY.

DEATH COUPLED WITH A CONTINGENCY—*Divesting—Gift over—Contingency restricted to Duration of Life Estate.*] A testator gave a fund to his widow for life, and after her death upon trusts in moieties for his two daughters during their respective lives, with ulterior trusts for their children respectively, and limitations in default of children of either, upon the trusts of the other moiety; and if neither daughter should have a child who should become entitled, then upon trust for his two sons, to be equally divided between them, their respective executors, administrators, and assigns; but if either of them died without issue living at his decease, then the whole to be in trust for the other of them, his executors, administrators, and assigns; and if both of them died without issue living at their respective deaths, then the fund should be in trust for Mrs. *S.*, her executors, administrators, and assigns; but if she should die without leaving issue at her decease, then it should be in trust for the daughters of *P. D.* living at the determination of the prior trusts. The testator's daughters survived the widow, and died childless. The sons both died without issue in the lifetime of the surviving daughter, who became tenant for life of the whole. Mrs. *S.* survived the daughters, and afterwards died without issue; upon which the representatives of a daughter of *P. D.*, who had survived Mrs. *S.* only one day, claimed the fund:—*Held* (reversing the decision of *Malins*, V.C.), that Mrs. *S.*, having survived the tenants for life, took an absolute indefeasible interest, and that the gift over to the daughters of *P. D.* did not take effect; for that if a fund is given to *A.* for life, and then to *B.*, with a gift over if *B.* dies without issue, death without issue in the lifetime of *A.* is taken to be intended, unless there be a context extending it to death without issue at

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any time.—The canons in *Edwards* v. *Edwards* (15 Beav. 357) approved. *In re* Heathcote's Trusts - - - - - - - 45

DEBT—Debtor's summons - 133, 298, 312, 324, *See* Debtor's Summons. 1—5. [617

—— Mortgage—Amount of—Taxation of costs *See* Taxation of Costs. [514

—— Petitioner in winding-up—Part payment—Repayment - - - - 511 *See* Winding-up Petition.

DEBT CAPABLE OF BEING ESTIMATED—*Provable Debt—Separation Deed—Void Condition—Annuity—Invalid Marriage—Deceased Wife's Sister—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 31.] A man went through the ceremony of marriage with a sister of his deceased wife, and lived with her as his wife. They afterwards separated, and a separation deed in the ordinary form was executed, in which she was described as his wife, and he covenanted with the trustees of the deed to pay her an annuity for their joint lives. There was a proviso that, if the parties should live together again by mutual consent, the deed should become void. The annuity was paid for twelve years, and then the man became bankrupt:—*Held* (affirming the decision of *Bacon*, C.J.), that the value of the future payments of the annuity was capable of estimation, and was provable in the bankruptcy.—As the parties never could legally live together as husband and wife, the proviso, making the deed void in the event of their doing so, must be disregarded. *Ex parte* Naden. *In re* Wood - - - 670

DEBTOR'S SUMMONS—*Bankruptcy Act*, 1869, *ss.* 9, 13—*Petition for Adjudication—Receiver—Payment of Debt to Petitioner.*] A creditor sued out a debtor's summons, and the debt not having been paid or secured, he presented a petition for adjudication, and got a receiver appointed. Soon afterwards the debtor, with the consent of the receiver, paid part of the debt to the creditor, and the creditor accordingly withdrew the petition for adjudication. The debtor had been adjudged bankrupt on the petition of another creditor after the part payment:—*Held*, that the receiver was a trustee for all the creditors, and had no right to permit the payment to be made to the creditor who sued out the debtor's summons, and that the money must be paid over to the trustee in the bankruptcy. *Ex parte* Jay. *In re* Powis 133

2. —— *Practice—Affidavit—Irregularity—Public Officer of Company—Bankruptcy Rules*, 1870, *r.* 15.] In an affidavit filed by the public officer of a company in support of a debtor's summons he was described as the registered public officer of the company, but the affidavit did not contain an express statement that he was such public officer, or that he was authorized to sue out the summons:—*Held*, that the affidavit did not sufficiently comply with Rule 15 of the *Bankruptcy Rules*, 1870, and the summons was dismissed for irregularity.—In the affidavit the words "severally make oath and say" were omitted by mistake:—*Held*, that the affidavit could not be objected to on that ground after it had been filed.—A debtor may sustain an application to have a debtor's summons dismissed for irregularity, although he has not distinctly denied the debt in his affidavit. *Ex parte* Torkington. *In re* Torkington - - 298

3. —— *Secured Debt—Garnishee Order—Petitioning Creditor—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 7. A creditor who holds garnishee orders covering sums due to the debtor to an amount exceeding the debt due to the creditor, can nevertheless obtain a debtor's summons against the debtor, and proceed thereon to have him adjudged a bankrupt. *In re* Tupper 312

4. —— *Practice—Affidavit—Irregularity—Public Officer of Company—Bankruptcy Rules*, 1870, *r.* 15.] In an affidavit filed by the public officer of a company in support of a debtor's summons he was described as the registered public officer of the company, but the affidavit did not contain an express statement that he was such public officer: and it contained a statement that he was authorized to make the affidavit, but no statement that he was authorized to sue out the debtor's summons:—*Held*, that the affidavit sufficiently complied with Rule 15 of the *Bankruptcy Rules*, 1870.—Where a debtor's summons is sued out upon a dishonoured bill of exchange it is not necessary to state or to prove the debt with the same strictness as in an action at law: it is sufficient to state it so that the debtor shall not be misled. *Ex parte* Lowenthal. *In re* Lowenthal - - - 324

5. —— *Affidavit denying Debt—Bankruptcy Act*, 1869, *s.* 7—*Bankruptcy Rules*, 1870, *r.* 22, *Form* 8.] A trader, who had been served with a debtor's summons calling on him to pay a debt of £3168, filed an affidavit in form No. 8 in the Schedule to the *Bankruptcy Rules*, 1870, denying "that he was indebted in the amount claimed in the summons." At the hearing of the summons, the debtor admitted that he was indebted to the amount of £650, but denied any further liability:—*Held*, that although the form of the affidavit was not consistent with the 7th section of the *Bankruptcy Act*, 1869, yet as it was in the form given in the Schedule it was sufficient; but that as there was a *bonâ fide* dispute the summons ought not to have been dismissed, but ought to have been suspended, without security, till the creditor had established his claim in an action at law. *Ex parte* Rowan. *In re* Kiddell - - - - - 617

DECREE—Inrolment of - 266, 269, 480 *See* Inrolment of Decree. 1, 2, 3.

DELEGATION OF POWER—Manager of company *See* Authority of Directors. [691

DELIVERY—Revocation of—Bill of exchange 27 *See* Bill sent by Post.

DELIVERY ORDER—Bonded warehouse - 602 *See* Order and Disposition. 2.

DEMURRER—*Ore tenus*—Misjoinder—Multifariousness - - - - 488 *See* Misjoinder.

DEPOSIT—On appeal—Sequestration - 101 *See* Sequestration.

—— Railway company—Lands Clauses Act 263 *See* Costs under Lands Clauses Act.

DEPOSIT OF DEEDS—*Bankruptcy—Creditor holding Security—Deposit of English Title-deeds with German Firm—Lex Loci Contractus—Personal Contract enforceable against Trustee.*] *S. & Co.* who were merchants in *London* and *Shanghai*, applied to the Appellants, who were merchants in *Prussia*, to open a credit on their behalf for £5000, and offered to deposit with them as a security the title-deeds of a house at *Shanghai*. The negotiation was commenced verbally, when all parties were in *Prussia*, but was concluded, after some correspondence, by a letter written by *S. & Co.* to the Appellants from *London*, inclosing the title-deeds of the house at *Shanghai*. The Appellants accordingly accepted bills drawn by *S. & Co.* and payable in *London*. *S. & Co.* shortly afterwards became liquidating debtors, a considerable sum being then due to the Appellants on the bills. No conveyance or memorandum of the deposit was made at the British Consulate at *Shanghai*, but the house remained registered in the name of *S. & Co.* The Appellants accordingly applied for an order that the trustee in liquidation should convey the house to them. Evidence was adduced that, according to the law of *Prussia*, the contract was binding personally on *S. & Co.*, but that, as the necessary formalities for perfecting the security at *Shanghai* had not been gone through, the Appellants had no mortgage or lien on the house:—*Held*, by *Mellish*, L.J., that the contract must be governed by English law, and that the Appellants had a good security on the house by the deposit of the deeds:—*Held*, by both the Lords Justices, that whether the contract was governed by English or by Prussian law, the contract was personally binding on *S. & Co.*, and could be enforced against their trustee in liquidation; and the Court made an order to sell the house and pay the proceeds to the Appellants. *Ex parte* HOLTHAUSEN. *In re* SCHEIBLER - - - 722

DEVASTAVIT—Proof for—Bankruptcy - 626
See PROOF AGAINST CO-PARTNER.

DEVISE OF "LANDS"—*Wills Act* (1 *Vict. c.* 26), *s.* 26—*Leaseholds for Years—Contrary Intention.*] The 26th section of the *Wills Act*, which provides that a general devise of the testator's lands shall include leaseholds, unless a contrary intention appear by the will, was intended to abolish a technical rule which generally defeated the intention, and not to substitute another technical rule in its place. If, therefore, on the fair construction of the will, there are indications of an intention that leaseholds should not pass by the devise of lands, they will be excluded.—A testator, after devising his mansion-house to his wife for life, devised his mansion-house and "lands" in strict settlement. There was a direction to trustees to receive and accumulate the rents during the minority of any tenant for life or tenant in tail by purchase, and to stand possessed of the accumulations upon trust, if such tenant for life or in tail attained twenty-one, or died under that age leaving issue entitled or inheritable under the will, to pay or transfer the funds to such tenant for life or in tail, his executors or administrators, as personal estate, but if such tenant for life or in tail died under twenty-one without leaving such issue, then to lay out the fund in the purchase of freeholds in fee simple to be settled to the same uses as the devised estates. There was a power of sale, and a direction to invest the moneys arising from sales in the purchase of freehold lands to be settled to the same uses, or leaseholds convenient to be held therewith, with a direction to settle the purchased leaseholds on like trusts, but so that they should not vest absolutely in any tenant in tail by purchase who did not attain twenty-one; but on his death under that age should devolve as if they had been freeholds of inheritance, and been settled accordingly. There was also a bequest of heir-looms to be held on trusts corresponding with the uses of the mansion-house, with a similar proviso against their vesting absolutely in any tenant in tail by purchase who did not attain twenty-one. The testator bequeathed his residuary personal estate to trustees upon trusts corresponding with the uses of the devised estates, with a proviso that it should not vest absolutely in any tenant in tail by purchase dying under twenty-one, but on his death under that age should devolve as if it had been freehold of inheritance included in the devise:—*Held* (affirming the decision of *Malins*, V.C.), that there was sufficient indication of an intention not to include leaseholds for years in the devise of lands, and that they passed under the residuary bequest. PRESCOTT *v.* BARKER - 174

DIRECTION—Not to enforce debt—Will - 128
See ELECTION.

DIRECTORS—Authority of - - - 691
See AUTHORITY OF DIRECTORS.

DISCHARGE IN BANKRUPTCY—*Liquidation by Arrangement—Resolution of Creditors to sell all the Estate for a fixed Sum—Refusal of Creditors to grant Discharge — Injunction to restrain Proceedings against after-acquired Property of Debtor.*] The creditors of a manufacturer resolved on a liquidation by arrangement, and appointed a trustee and a committee of inspection. They afterwards passed a resolution accepting an offer by the debtor and *B.*, a friend of his, to purchase "the whole of the debtor's estate and effects" for £6000, towards which the debtor was to contribute £200, payable by instalments. A deed was executed conveying the machinery, stock-in-trade, &c., and all other property then vested in the trustee under the liquidation, or which he had power to dispose of, to *B.* *B.* took the debtor into partnership in the business, and the instalments were all duly paid. The debtor then applied for his discharge, but a meeting of the creditors, summoned to consider the question, refused to grant it:—*Held* (affirming the decision of the Chief Judge in Bankruptcy), that the sale included all the future property of the debtor, and that the debtor was entitled to an injunction restraining the committee of inspection and other creditors from taking proceedings against property acquired by him since the commencement of the liquidation. *Ex parte* TINKER. *In re* FRANCE - - - - - 716

DISCLAIMER IN BANKRUPTCY—*Disclaimer of Lease—Notice by Landlord — Bankruptcy Act*, 1869, *ss.* 23, 24—*Bankruptcy Rules*, 1871, *r.* 28.] Where the trustee of a bankrupt's estate has received a notice calling upon him to disclaim

DISCLAIMER IN BANKRUPTCY—*continued.*
a lease within twenty-eight days, under the 24th section of the *Bankruptcy Act*, 1869, and requires an extension of time beyond the twenty-eight days in order to obtain the consent of the Court under Rule 28 of the *Bankruptcy Rules*, 1871, he must apply for such extension before the twenty-eight days have elapsed, unless he can shew some special circumstances to excuse the delay. Whether, if the trustee executes a disclaimer without the consent of the Court, it would be nevertheless binding on the landlord, *quære*. *Ex parte* Lovering. *In re* Jones 586

DISCOVERY—*Answer — Mortgagee — Redemption Suit—Accounts.*] A Defendant in a redemption suit, who admits that the Plaintiff is entitled to a decree, cannot refuse to set out in his answer his accounts as mortgagee. The rule as to answering applicable to redemption suits is the same as for any other suits for accounts. Order of *Malins*, V.C., affirmed. Elmer *v.* Creasy - - 69

2. ——*Answer—Insufficiency—Discovery before Title is established.*] The Plaintiff filed her bill to establish that a business carried on by three of the Defendants in partnership belonged to the estate of her late husband, having been commenced and carried on with assets which the first two of them, who had carried on her husband's business in partnership with her till they commenced the new business, had abstracted from the old business. The interrogatories required these Defendants to set forth whether they, or any of them, had drawn out of the new business any money for their or his own account in respect of capital advanced, profits, or otherwise, and to set forth the particulars of the moneys so drawn out. The third Defendant declined to answer this interrogatory, submitting that the Plaintiff was not entitled to this discovery till she had established her right to a decree:—*Held* (affirming the decision of the Master of the Rolls), that the interrogatory must be answered. Sault *v.* Browne 364

3. —— *Answer — Exceptions—Private Transactions.*] Where a Plaintiff files a bill founded on the alleged agency of the Defendant, which is in question in the suit, the Defendant will not be compelled to answer interrogatories as to what appear to be his private transactions.—Order of *Malins*, V.C., affirmed. Great Western Colliery Company *v.* Tucker - - - - 376

4. —— *Answer—Exceptions—Date of Deed under which Defendant claims—Forfeiture Clause—Bill by Trustee for Administration—Purchase for Value without Notice.*] A testator gave real estates to trustees in trust for his son for life, with a gift over if he charged or incumbered them. One of the trustees filed a bill for the administration of the trusts of the will, and afterwards filed a supplemental bill against certain Defendants, who were in possession of part of the estates, alleging that they claimed under a charge made in their favour by the tenant for life, which operated as a forfeiture. The Defendants were interrogated as to the particulars of all charges in their favour, if any, of the property of the testator. The Defendants stated in their answer that they claimed under no charge made by the tenant for

DISCOVERY—*continued.*
life, but under a lease at a rack rent which he had granted to a lessee, who had mortgaged the lease to them. The Plaintiff excepted to the answer because the Defendants did not set forth the date of the lease:—*Held* (affirming the decision of *Malins*, V.C.), that the Plaintiff, being a trustee, was entitled to know the particulars of those who claimed to be *cestuis que trust*; and the exceptions must therefore be allowed. Hurst *v.* Hurst 762

DISCRETION—Bishop—Church Discipline Act
See Commission of Inquiry. [138

—— Court—Companies Act, 1862, s. 35 - 664
See Rectification of Register.

DISHONOUR—Foreign bill of exchange—Notice
See Notice of Dishonour. [591

DISSENTIENT CREDITORS — Resolution for composition - - - 290
See Meeting of Creditors. 1.

DISSENTIENT SHAREHOLDERS — Amalgamation - - - - - 1
See Amalgamation of Companies. 1.

DISSOLVED COMPANY—Bill against - 488
See Misjoinder.

DIVERSION OF WATER—*Riparian Proprietors—Canal Company—Use of Water — Damage—Selling Water.*] A canal company, having under their Act power to supply their canal with water from the neighbouring streams, brought a mill and turned the mill stream into the canal. Many years afterwards a waterworks company diverted part of the mill stream, and thereby supplied with water a neighbouring town:—*Held*, that the canal company, both under their Act and as owners of the mill, were riparian proprietors, and had power to prevent the unlawful use of the water by other riparian proprietors, and that the supply of a neighbouring town was such an unlawful use:—*Held*, that as the Defendants claimed a right so to use the water, the Plaintiffs were not (in order to support their bill) obliged to prove actual damage to the canal:—*Held*, that the canal company had not a right to require more water than they wanted for the purposes of the canal.—*Semble*, nevertheless, that the canal company might sell any surplus water which remained after they had used it for the purposes of the canal.—Decree of *Malins*, V.C., reversed. Wilks and Berks Canal Navigation Company *v.* Swindon Waterworks Company - - - 451

DIVESTING—Gift over—Death without issue 45
See Death coupled with a Contingency.

DOCUMENTS—Production of - - 569
See Production of Documents.

"DYING WITHOUT ISSUE"—*Wills Act* (1 *Vict.* c. 26, *s.* 29)—*Indefinite Failure of Issue—Executory Bequest—Will explained by Codicil.*] A testator, in 1846, gave his residuary real and personal estate to *J. S. L.* and the heirs male of his body lawfully begotten for ever; but in case of his death without heirs male of his body lawfully begot, then the property to go to *P. C. L.* in the same manner; and if *P. C. L.* should die without heirs male of his body lawfully begot, then the

"DYING WITHOUT ISSUE"—*continued.*

property to go to *J. S. A.* in the same manner. By a codicil the testator, after reciting that by his will he had directed that in the event of the death of *J. S. L.* "without leaving male issue him surviving" the residue of the testator's real and personal estates should go to *P. C. L.*, revoked that bequest, and in the event of the death of *J. S. L.* "without leaving male issue him surviving," gave the residuary estate to the eldest daughter (if any) of *J. S. L.*:—*Held* (affirming the decision of *Bacon*, V.C.), that sect. 29 of the *Wills Act* (1 Vict. c. 26) did not apply, and that the gifts over to *P. C. L.* and *J. S. A.* were void as to the personalty, as being on an indefinite failure of heirs male, and that the codicil did not alter their effect, and that under the will and codicil *J. S. L.* took an absolute interest in the personalty, subject only to an executory gift over in favour of his eldest daughter if he died leaving no male issue surviving him. DAWSON *v.* SMALL [651

EASEMENT—Covenant for quiet enjoyment 463
See LIGHT AND AIR. 2.

—— Light and air - - - 212, 463
See LIGHT AND AIR. 1, 2.

ECCLESIASTICAL LAW—Church Discipline Act —Commission of inquiry - - 138
See COMMISSION OF INQUIRY.

ELECTION—*Will.*] A testatrix advanced to the Defendant £900 on the security of an assignment by him of a covenant by *F.* to transfer a sum of £1000 stock, and to pay interest in the meantime. By her will she gave *F.* £3000, and all sums due to her from him, and directed her executors not to require payment of the £900 due from the Defendant, but out of the £3000 given to *F.* to retain enough to purchase £1000 stock for the benefit of her estate, and if the stock were worth more than the £900 and interest, the surplus to be paid to the Defendant. *F.* having predeceased her, she, by a codicil, directed that the £3000 should form part of her residuary personal estate, but directed her executors not to call on *F.'s* representatives for transfer of the £1000 stock, nor to enforce payment of the £900 from the Defendant:—*Held*, that the Defendant was not at liberty to enforce performance of the covenant to transfer the £1000 stock against *F.'s* estate, except as to the difference between the £900 and the value of the stock. —Decision of *James*, L.J., for *Wickens*, V.C., varied. SYNGE *v.* SYNGE - - - 128

—— Creditor — Action against compounding debtor—Receipt of composition - 673
See INJUNCTION IN BANKRUPTCY.

EQUITY OF REDEMPTION—Law of Property Amendment Act. - - - 229
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EVIDENCE—Additional—Appeal—Bankruptcy [667
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—— Proof of seisin in ejectment suit—Admission - - - - - 739
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—— Sealing of patent — Examination of witnesses *viva voce* - - - 633
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EXCEPTIONS TO ANSWER—Discovery [69, 264, 376, 762
See DISCOVERY. 1—4.

EXECUTION—Estate in remainder belonging to infant - - - - 369
See JUDGMENT CREDITOR.

EXECUTION CREDITOR—*Bankruptcy—Trader—Payment to Sheriff before Levy—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 6, *sub-s.* 5, *s.* 87.] The sheriff having received a writ of execution against a trader for a debt exceeding £50, the debtor, on the 24th of July, before any levy had been made, paid to the sheriff's officer a large part of the debt in a bill, a cheque drawn by another person, and bank notes. On the 25th of July the sheriff's officer asked the creditors whether they would accept in part payment what the debtor had given him, and shewed them the bill. They expressed their assent. On the 26th of July (Saturday) the debtor filed a liquidation petition, and a receiver was appointed. On the 28th of July the sheriff's officer, having received the remainder of the debt from another person liable for it, paid the whole to the creditors:—*Held* (reversing the decision of the Chief Judge), that the transaction was a payment under pressure; and that the creditors were not bound to hand over to the trustee the bill of exchange, the cheque, or the bank notes. *Ex parte* BROOKE. *In re* HASSALL - - 301

2. —— *Bankruptcy—Protected Transaction—Bankruptcy Act*, 1869, *s.* 95, *sub-s.* 3—*Notice of Act of Bankruptcy—Onus Probandi—Notice to Sheriff's Officer.*] In sect. 95, sub-sect. 3, of the *Bankruptcy Act*, 1869, "act of bankruptcy" means an act of bankruptcy which has been committed prior to the time of seizure.—The onus is on the execution creditor, who claims the protection of that section, to prove that he had no notice of any prior act of bankruptcy.—Notice to the sheriff's officers in possession under an execution of an act of bankruptcy is not notice to the creditor. *Ex parte* SCHULTE. *In re* MATANLÈ - - 409

3. —— *Bankruptcy—Seizure and Sale—Act of Bankruptcy—Payment of Proceeds to Execution Creditor—Subsequent Bankruptcy — Bankruptcy Act*, 1869, *ss.* 6, 87, 95—*Sales made on different Days—Sale to Execution Creditor.*] An execution levied by seizure and sale of a trader's goods for a debt exceeding £50, although an act of bankruptcy, is not for that reason necessarily a void proceeding; and if the execution creditor had no notice of a prior act of bankruptcy, and no notice of a petition for adjudication is given to the sheriff under the 87th section of the *Bankruptcy Act*, 1869, within fourteen days after the sale, the execution creditor is entitled to the proceeds of the sale notwithstanding a supervening bankruptcy. —The sheriff may make a valid sale by private contract of goods seized under an execution, to the execution creditor.—If the sheriff sells goods seized under the same writ on different days, all

EXECUTION CREDITOR—*continued.*
the sales will be considered one transaction—*Slater* v. *Pinder* (Law Rep. 6 Ex. 228) considered. *Ex parte* Villars. *In re* Rogers - - 432

4. —— *Bankruptcy—Notice to Sheriff of Petition for Liquidation—Neglect of Creditors to pass Resolution—Subsequent Petition and Adjudication of Bankruptcy—Bankruptcy Act*, 1869, *ss.* 87, 125, *sub-s.* 12—*Bankruptcy Rules*, 1870, *r.* 267—*Mistake of Law, Relief against.*] A creditor levied execution on his debtor's goods for a debt exceeding £50, and the sheriff seized and sold them. The debtor filed a petition for liquidation, and served notice of it on the sheriff before the sale. Before the expiration of fourteen days after the sale the first meeting of the creditors was held, but no resolution was passed. The sheriff then, after the expiration of the fourteen days, paid the proceeds of the sale to the execution creditor. Afterwards a bankruptcy petition was filed by another creditor, which stated the filing of the petition for liquidation and the failure of the proceedings, and the debtor was adjudicated bankrupt under this petition. The trustee demanded the proceeds of the sale from the execution creditor, who paid them to him, believing that he was legally entitled to them:—*Held*, that the liquidation proceedings entirely came to an end on the failure of the meeting to pass a resolution, and that the debtor was not adjudged a bankrupt on the liquidation petition within the meaning of the 87th section of the *Bankruptcy Act*, 1869; and the sheriff was therefore justified in paying the proceeds of the sale to the execution creditor:—*Held*, also, that the Court had jurisdiction to relieve against the mistake of law, and to order the money to be repaid by the trustee to the execution creditor.—Proceedings under Rule 267 of the *Bankruptcy Rules*, 1870, for adjudication of bankruptcy based upon the neglect of the first meeting of creditors to pass a resolution for liquidation or composition, must be commenced by petition. *Ex parte* James. *In re* Condon [609

EXECUTOR—Devastavit—Proof in bankruptcy
See Proof against Co-partner. [626

—— Proof by some executors only - 336
See Joint Contract.

EXECUTORY BEQUEST—Dying without issue
See Dying without Issue. [651

EXPERT—Employment of—Nuisance - 705
See Smoke.

EXTENDED TERM—Copyright - - 518
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FARM BUILDINGS—Erection of—Proceeds of sale of timber - - - 681
See Settled Estates Act.

FIRE INSURANCE—Action against person causing fire—Right of insurers to interfere
See Subrogation. [483

FIXTURES—Trade—Bill of sale of—Registration [576
See Registration of Bill of Sale.

FOREIGN JUDGMENT—*Winding-up—Attachment—Property Abroad—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 163.] When a company has in this country been ordered to be wound up, judgment creditors who are in this country, and have proved under the winding-up, will not be allowed to attach property in *India* belonging to the company.—Order of *Malins*, V.C., affirmed. *In re* Oriental Inland Steam Company. *Ex parte* Scinde Railway Company - - 557

FORMÂ PAUPERIS—*Practice—Property—Injunction.*] A farming tenant who has valuable crops on his farm, but no other property, will not be admitted to defend *in formâ pauperis*, although he has in the suit been restrained from selling or removing the crops.—Order of *Jessel*, M.R., affirmed. Ridgway *v.* Edwards - - 143

FORFEITURE CLAUSE—Discovery of date of deed - - - - - 762
See Discovery. 4.

FORTY-FIVE DEGREES—Rule as to—Light and air - - - - - 212
See Light and Air. 1.

FRAUD—Inducement to take shares in company—Trial at law - - - 664
See Rectification of Register.

—— Life assurance—Misrepresentation as to age - - - - - 397
See Commissioners for Reduction of National Debt.

FRAUDULENT PREFERENCE—*Bankruptcy—"Payee in Good Faith and for Valuable Consideration"—Bankruptcy Act*, 1869, *s.* 92.] The protection given by the 92nd section of the *Bankruptcy Act*, 1869, in cases of fraudulent preference to a purchaser, payee, or incumbrancer in good faith and for valuable consideration, extends to the creditor who is so preferred as well as to those claiming under him. If, therefore, a creditor for valuable consideration has no notice or suspicion that his debtor is in insolvent circumstances when the payment or transfer by way of fraudulent preference is made to him, he is protected. *Ex parte* Butcher. *In re* Meldrum - 595

2. —— *Payment in Pursuance of a previous Agreement—Payment in ordinary Course of Business—"Payee in Good Faith and for Valuable Consideration"—Bankruptcy Act*, 1869, *s.* 92.] *C.*, a manufacturer in *England*, was in the habit of purchasing flax from *P.*, in *Belgium*, whose sister he had married. In August, 1872, he owed upwards of £4000 to *P.*, as the executrix of her mother's estate; and also £800 on the current account between *P.* and himself; and being pressed by her for payment he promised to send £2350 on account of the debt to the estate. On the 4th of November, 1872, *C.* sent bills to the amount of £1000 to *P.*, who received the proceeds, and applied £2350 towards the debt to her mother's estate, and carried the rest to the account current between *C.* and herself, and with that sum and other sums afterwards remitted she purchased flax, and consigned it to *C.* *C.* was at that time in insolvent circumstances, and on the 5th of November committed an act of bankruptcy, on which he was adjudicated bankrupt on the 28th of November. The trustee claimed the sum of £4000, as having been paid to *P.* by way of fraudu-

FRAUDULENT PREFERENCE—*continued.*
lent preference:—*Held* (affirming the decision of *Bacon*, C.J.), that there was no fraudulent preference. *Ex parte* Kevan. *In re* Crawford [752

FRENCH POST OFFICE—Recovery of letter by sender - - - - - 27
See Bill sent by Post.

FURNITURE—Hire of—Reputed ownership 621
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See Debtor's Summons. 3.

GENERAL RULES IN BANKRUPTCY, 1870, r. 15
See Debtor's Summons. 2, 4. [298, 324
—— r. 22 form 8 - - - - 617
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—— rr. 120, 304, 305, 307 - - - 506
See Trustee in Liquidation.
—— r. 143 - - - - - - 304
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—— r. 260 - - - - - - 673
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—— r. 267 - - - - - - 609
See Execution Creditor. 4.
—— r. 292 - - - - - - 144
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—— —— 1871, r. 28 - - - - - 586
See Disclaimer in Bankruptcy.

GLEBE—Sale under Lands Clauses Act—Reinvestment of purchase-money - 684
See Reinvestment of Purchase-money.

GOODS—Apparent possession - - 697
See Apparent Possession.
—— Reputed ownership - - 602, 621
See Order and Disposition. 2, 3.

HEARING IN CAMERÂ—*Practice—Suit to restrain Publication of Private Letters.*] It is contrary to the practice of the Court to hear causes in private without the consent of both parties, except in cases which affect lunatics or wards of Court. But whether the Court would not hear a cause in private without the consent of one of the parties, if the whole object of the suit would be defeated by a hearing in public, *quære*. Andrew *v.* Raeburn - - - - - - 522

HIGHWAY—Soil of—Laying down water pipes
See Mandatory Injunction. 1. [221

HUSBAND AND WIFE—Bankruptcy—Separate estate—Debt before marriage - 307
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—— Partnership—Bankruptcy - - 508
See Joint and Separate Estates.

ILLEGITIMATE CHILDREN — *Will — After-born Children—Child en ventre sa mère at Date of Will, but born before Death of Testator—Reputation—Gift conducive to Immorality.*] A testator, who had gone through the ceremony of marriage with *M. L.*, his deceased wife's sister, who had two daughters, *C.* and *E.*, by him, and who was *enceinte* with a third at the date of the will, gave a moiety of his property to trustees in trust for *M. L.* for life, and after her death for his reputed children *C.* and *E.*, and all other children which he might have or be reputed to have by *M. L.*, then born or thereafter to be born. The third child was born before the testator's death, and was acknowledged by him as his child:—*Held* (*dissentiente* Lord *Selborne*, L.C.), that the after-born child was entitled to share with her sisters under the will.—Decision of *Wickens*, V.C., reversed.—*Hill* v. *Crook* (Law Rep. 6 H. L. 265), *Pratt* v. *Mathew* (22 Beav. 328), *Blodwell* v. *Edwards* (Cro. Eliz. 509), *Metham* v. *Duke of Devon* (1 P. Wms. 529), *Howarth* v. *Mills* (Law Rep. 2 Eq. 389), and *Holt* v. *Sindrey* (Law Rep. 7 Eq. 170) discussed. Occleston *v.* Fullalove [147

INCREASE OF CAPITAL OF COMPANY—Resolution for - - - - - 1
See Amalgamation of Companies. 1.

INDORSEMENT—Bill of exchange—Revocation of delivery - - - - 27
See Bill sent by Post.

INFANT—Action by—Compromise - - 414
See Infant Transferee.
—— Real estate of—Seizure by sheriff - 369
See Judgment Creditor. 2.
—— Transfer of shares to—Father buying in his son's name - - - - 414
See Infant Transferee.

INFANT TRANSFEREE — *Company — Shares — Real Purchaser—Compromise of Action brought by Infant.*] The Defendant purchased, through his broker, 300 shares in a joint stock company, and gave directions that they should be transferred into the name of his son, *G. E.* On the same day the Plaintiff instructed his broker to sell 100 shares in the company, and they were bought by the Defendant's broker, on his account, through a jobber in the ordinary way, and were transferred to *G. E.*, and were registered in his name. At that time *G. E.* was an infant, of which fact the Plaintiff was not aware. Soon afterwards the company was wound up voluntarily, and *G. E.* then brought an action by his father, as next friend, against the Plaintiff, who was an auditor of the company, charging him with fraud in selling the shares, knowing that the company was in an insolvent condition, and claiming damages. The action was compromised on the terms that all charges of fraud should be withdrawn, and that the purchase-money should be repaid to *G. E.* The liquidators on discovering that *G. E.* was an infant substituted the name of the Plaintiff for his as a contributory of the company. The Plaintiff then filed a bill against the Defendant, charging that he was the real purchaser of the shares, and that the Plaintiff was not aware of that fact when he entered into the compromise with *G. E.*, and claiming to be indemnified by the Defendant against all loss in respect of the transaction:—*Held*, by *Malins*, V.C., that the Plaintiff was entitled to be indemnified, and that he was not precluded from maintaining the suit by the compromise with *G. E.*:—But *held*, by the Court of Appeal (reversing the decision of *Malins*, V.C.), that the compromise was an

INFANT TRANSFEREE—*continued.*
effectual bar to the Plaintiff's claim to relief, and that the fact of his ignorance that the Defendant was the real owner of the shares was immaterial. MAYNARD *v.* EATON - - - - 414

INJUNCTION—Action against a person causing fire—Right of insurers to interfere 483
See SUBROGATION.
—— Bankruptcy - - - - 673
See INJUNCTION IN BANKRUPTCY.
—— Cutting timber - - - - 116
See WASTE.
—— *Formâ pauperis* - - - 143
See FORMÂ PAUPERIS.
—— Light and air - - - 212, 463
See LIGHT AND AIR. 1, 2.
—— Liquidation by arrangement—Sale of property to debtor—After-acquired property - - - - 716
See DISCHARGE IN BANKRUPTCY.
—— Mandatory - - - 214 n., 221
See MANDATORY INJUNCTION. 1, 2.
—— Nuisance—Smoke—Scientific evidence 705
See SMOKE.
—— Obstruction of right of way - - 111
See SUBSTITUTED WAY.
—— Obstruction of river - - - 423
See OBSTRUCTION OF NAVIGATION.

INJUNCTION IN BANKRUPTCY—*Liquidation—Debt not provable—Declaration containing Counts in Tort as well as Counts in Contract—Bankruptcy Act*, 1869, *s.* 31—*Bankruptcy Rules*, 1870, *r.* 260—*Resolution for Composition—Election of Creditor to proceed at Law.*] A creditor brought an action at law against his debtor, in which he joined counts in contract for breach of promise in not accepting certain bills of exchange, with counts in tort for misrepresentations contained in a letter written by the debtor. The debtor afterwards filed a petition for liquidation, and the creditors agreed to a composition:—*Held*, that the debtor was entitled to an injunction to restrain the Plaintiff from proceeding at law on the counts in contract, but that the Court had no jurisdiction to restrain him from proceeding on the counts in tort:—*Held*, also, that the creditor having elected to proceed at law, could not receive a composition in respect of what he might fail to recover in the action. *Ex parte* BAUM. *In re* EDWARDS - 673

INQUIRY—Commission of - - - 133
See COMMISSION OF INQUIRY.
—— When lunacy commenced - - 677
See INQUISITION IN LUNACY.

INQUISITION IN LUNACY—*Lunacy Regulation Act*, 1862 (25 & 26 *Vict. c.* 86), *s.* 3—*Inquiry when Lunacy commenced.*] A Portuguese gentleman whose domicil was in *Portugal*, whose property, with a very trifling exception, was in *Portugal*, and whose wife and only child were residing there, became lunatic in *England*, and had been so for some years. A petition was now presented by some relations in *England* for an inquiry as to his state of mind. Proceedings in lunacy were at the same time taken in *Portugal*, by his wife, and the Portuguese Court issued a request to the English Courts to inquire into his state of mind. The wife applied here to have an inquiry as to the time when the lunacy commenced, it being desired by the Portuguese Court that such an inquiry should be made in *England*:—*Held*, by *James*, L.J., that the 25 & 26 Vict. c. 86, s. 3, does not take away the power of the Court to direct such an inquiry where special circumstances render it desirable:—But *held*, that, in the circumstances of the present case, such an inquiry ought not to be directed, as it was not required for any purpose of the proceedings in *England*, and the finding might affect other parties who could not effectually intervene in the inquiry, and yet would probably be treated in *Portugal* as concluded by it. *In re* SOTTOMAIOR (A LUNATIC) - - 677

INROLMENT OF DECREE—*Notice of Appeal Motion—Vacating Inrolment.*] Notice of appeal motion was served without any signature, though the name of the solicitors serving it appeared on the back. After some days the solicitor of the Appellant, having discovered the omission, asked the solicitor of the Respondent to allow the error to be corrected. The Respondent's solicitor refused this, and stated that every technical advantage would be taken. The appeal motion was set down, and the Respondent's solicitor informed of it, but no notice of its being set down was regularly served. The Respondent's solicitor, at the earliest possible moment, inrolled the order appealed from:—*Held*, that, as distinct notice that no technicality would be waived had been given, the Respondent was entitled to avail himself of the irregularity in the notice of motion and maintain the inrolment, though there had been a correspondence which, standing alone, might have led the Court to vacate it. *In re* LIMEHOUSE WORKS COMPANY - - 266

2. —— *Enlarging Time—Cons. Ord. XXIII., r.* 28.] A Plaintiff, within one month of the end of the five years after a decree had been made, applied to have it inrolled, and obtained an order accordingly. After the expiration of the five years, he discovered that one of the Defendants was dead, and having then revived the suit, he applied to have the decree inrolled. The application was refused. PATCH *v.* WARD - - - - 269

3. —— *Interlocutory Order—Re-hearing.*] An order was made staying all further proceedings in an administration suit. Some years afterwards one of the parties beneficially interested presented a petition praying that this order might be discharged, and that certain further accounts might be directed against one of the executors. This petition was dismissed in the Court below on the merits, and the order of dismissal was inrolled:—*Held*, that although for some purposes an application to the Court of Appeal to discharge an order made on motion or petition in a suit is treated as a new application, the inrolment of the order dismissing the petition on the merits prevented the Court from entertaining a petition of re hearing. OLLERENSHAW *v.* HARROP - - - 480

INSPECTORSHIP DEED—*After-acquired Property—Possibility of Future Benefit—Moral Obligation.*] The *C. Railway Company* owed money to *P.*, who was their engineer and agent, for preliminary expenses. In the year 1866, before the railway had been commenced, the *C. Company* sold their undertaking to three other railway

INSPECTORSHIP DEED—*continued.*
companies, and an agreement was executed between them by which the three companies agreed with the *C. Company*, among other things, that the contract for the construction of the railway should be given to *P.* or his nominee. *P.* was no party to this deed, but was employed as the agent of the *C. Company* in preparing it. In 1867 *P.* executed an inspectorship deed, by which he covenanted that he would get in and realize all his estate and effects, under the direction of the inspectors, for the benefit of his creditors, to be administered as in bankruptcy, and also that he would, whenever called upon to do so, assign to the inspectors all his estate and effects remaining undivided. And it was provided that as soon as all the said estate should be fully administered or assigned to the inspectors, the deed should operate as a full discharge to the debtor. In 1871 *P.* nominated a firm of contractors for the construction of the railway, and received from them a sum of £3500 for so doing. The inspectors claimed this sum as part of his estate:—*Held*, first, that as *P.* was not a party to the contract between the *C. Company* and the other three companies, and as there was no evidence that the *C. Company* had constituted itself a trustee for him, the expectation of his deriving a benefit from the contract was not such an interest as could be affected by the inspectorship deed: Secondly, that the inspectorship deed only affected property which belonged to the debtor at the time of its execution, and that the sum in question being after-acquired property the inspectors were not entitled to it. *Ex parte* Piercy. *In re* Piercy - 33

INTENTION—Will—1 Vict. c. 26, s. 26 - 174
See Devise of "Lands."

INTEREST ON MORTGAGE—*Transfer of Mortgage—Payment of Interest before Transfer.*] An estate subject to a mortgage was vested in *C.* upon trust to set apart out of the rents a fixed yearly sum, out of which he was to pay the interest on the mortgage and accumulate the residue as a sinking fund to pay off the principal. In June, 1864, the interest being in arrear, the mortgagees advertised the property for sale. *C.* thereupon applied to *F.* to pay off the mortgagees and take a transfer, which he agreed to do. The mortgagees would not stop the sale unless the whole arrear of interest and their costs were paid them, which *F.* at once did; and he subsequently paid them the interest down to September, 1864. The transfer was not made till August, 1865, and it purported to transfer the principal sum with interest only from September, 1864. A contemporaneous deed was executed by which *C.* purported to charge the estate with the payment of a principal sum made up of the payments by *F.* in 1864, and the costs and interests thereon. It was admitted that this deed was invalid, as being beyond the powers of the trustee. A bill for redemption having been filed by the beneficial owners:—*Held* (reversing the decision of *Hall*, V.C.), that *F.* was entitled to charge in his accounts the sums paid by him in 1864 for interest, notwithstanding the form of the deeds of 1865, and the fact that *C.* was guilty of a breach of trust in allowing the interest to be in arrear. Cottrell *v.* Finney - - - - 541

INTERPLEADER—*Two Suits—Costs.*] *A.* and *B.* both claimed goods which were in the hands of shipowners. *B.* had mortgaged to *C.* *A.* filed a bill against the shipowners and *B.*, claiming the goods. Then *C.* brought an action against the shipowners for non-delivery, after which *C.* was added as a Defendant to *A.'s* suit. Then the shipowners filed a bill against *C.* to restrain the action, and an injunction was granted on an undertaking for damages:—*Held*, that as the second suit was against one only of the claimants, the Plaintiffs in the second suit could not have their costs as on a bill of interpleader, and must pay costs and damages to the mortgagee.—Order of *Bacon*, V.C., reversed. Laing *v.* Zeden - 736

INVALID MARRIAGE—Deceased wife's sister—Separation deed - - - 670
See Debt capable of being estimated.

IRISH BANKRUPTCY—Distribution of assets 74
See Joint and Separate Adjudications.

IRREGULARITY—Debtor's summons—Affidavit
See Debtor's Summons. 2, 4. [298, 324

JOINT AND SEPARATE ADJUDICATIONS—*Distribution of Assets—Irish Bankruptcy.*] One of two partners was adjudicated bankrupt in *England*, and the other in *Ireland*; they were then jointly adjudicated bankrupts in *Ireland*. Most of the joint creditors were in *England*, and a considerable part of the assets was in *England*:—*Held*, that the assets in *England* would not be handed over to the assignees in the joint bankruptcy. The effect of a joint adjudication after separate adjudications, discussed. *In re* O'Reardon - - - - - - 74

JOINT AND SEPARATE ESTATES—*Bankruptcy—Husband and Wife—Quasi-Partnership.*] A trader at *Brighton* married a widow who was entitled to three-fourths of the profits of a *London* business. He afterwards bought the remaining one-fourth of the *London* business, and covenanted with a trustee that three-fourths of the profits of the *London* business should be for the separate use of the wife. A resolution was duly made for liquidation of the affairs of the trader:—*Held*, that the assets of the *London* business were first to be applied in payment of the creditors of the *London* business; and that only the surplus would go to the general creditors. *In re* Childs [508

2. —— *Partnership—Death of Partner—Bankruptcy of Survivors.*] Four persons carried on a business in partnership under a deed which provided that the death of a partner should not dissolve the partnership, but that the business should be carried on by the survivors or survivor, and the share of the deceased partner ascertained at the next half-yearly stock-taking, and paid to his representatives by instalments. Two of the partners died, and afterwards the survivors became bankrupt. No steps had then been taken to ascertain the shares of the deceased partners:—*Held* (affirming the decision of the Chief Judge), that the creditors of the four partners had no right to have the joint assets of the four which remained *in specie* applied first in payment of their debts.—*Ex parte Morley* (Law Rep. 8 Ch. 1026) distinguished. *In re* Simpson - 572

JOINT CONTRACT—*Partners—Death of one Contractor—Share of Profits—Blank in Agreement—Parties to Agreement — Evidence of Intention.*] Five contractors jointly contracted to build a harbour, the building of which would take at least five years. Soon afterwards one of the contractors died:—*Held*, that his estate was entitled to share in the profits of the contract; and that those profits were to be the actual profits ascertained when the contract was completed, and not by valuation or by sale of the contract.—*Ambler* v. *Bolton* (Law Rep. 14 Eq. 427) distinguished.—The deceased contractor named in his will three executors. Before the will was proved, the four other contractors signed an agreement, in which they, and also the executors of the will, were the parties, a blank being left for the names of the executors. The will was afterwards proved by two only of the executors, and those two executors then signed the agreement:—*Held*, on the construction of the agreement, that, though signed by two only of the executors, it was binding on the other contractors:—*Held*, also, that no regard could be paid to evidence that the other contractors expected the concurrence of the third executor, and would not have entered into the agreement if they had been aware that he would renounce.—Decree of *Bacon*, V.C., reversed. McClean *v.* Kennard - 336

JUDGMENT—Foreign—Winding up in *England*
See Foreign Judgment. [557

—— Infant—Estate in remainder - - 369
See Judgment Creditor. 2.

—— Mortgaged estate — Law of Judgments Amendment Act - - - 229
See Judgment Creditor. 1.

JUDGMENT CREDITOR — *Law of Judgments Amendment Act* (27 & 28 *Vict. c.* 112), *ss.* 1, 5—*Equity of Redemption—"Delivery in Execution."*] Equitable interests in land are within the 1st section of the 27 & 28 Vict. c. 112. Therefore, if a judgment creditor who has sued out an elegit is unable to obtain delivery by the sheriff of his debtor's lands by reason of the legal estate being outstanding, he must apply to the Court of Chancery to remove the impediment, and the order of the Court will be a delivery in execution within the statute.—A judgment creditor sued out an elegit against his debtor, who had no other interest in land than an equity of redemption, and the sheriff accordingly returned *nil*. Soon afterwards the debtor became bankrupt. The debtor then filed a bill asking for a declaration that he had a charge on the debtor's equity of redemption at the time of the bankruptcy:—*Held*, on demurrer (affirming the decision of *Malins*, V.C.), that the creditor had no charge on the land. Hatton *v.* Haywood - - - 229

2. —— *Law of Judgments Amendment Act* (27 & 28 *Vict. c.* 112), *ss.* 1, 4—*Remainder—Infant—Petition for Sale—Erroneous Return by Sheriff.*] A Plaintiff, who had recovered judgment with damages in an action in tort against an infant, sued out an elegit against the infant's land on the judgment. The infant's only interest in land was a remainder in fee expectant on the death of a tenant for life, which produced no present income to the infant. The sheriff returned that the infant was seised of the reversion of the land in fee simple, and that it was of the annual value of

JUDGMENT CREDITOR—*continued.*
£124, and that he had delivered the premises to the creditor. The creditor then presented a petition under the 27 & 28 Vict. c. 112, s. 4, for a sale of the infant's interest in the land:—*Held*, first, that the sheriff had no power to seize an estate in remainder belonging to an infant, and therefore the judgment creditor had acquired no charge on the infant's interest. Secondly, that the sheriff having erroneously returned that the infant was seised of a reversion producing a present income, a petition for sale of the infant's interest, which was a bare remainder, was inconsistent with the return and could not be supported.—The decision of *Malins*, V.C., reversed. *In re* South - - - - - - - 369

JURISDICTION — Bankruptcy — Partnership wound up in Chancery - - 192
See Bankruptcy Jurisdiction.

—— Damages—Light and air—Mandatory injunction - - - - - 212
See Damages under Cairns' Act.

—— Fund and Defendants out of jurisdiction—Bombay Civil Service Fund—Submission to jurisdiction - - - 495
See Mutual Insurance Society.

LAND INJURIOUSLY AFFECTED—School Board—Light - - - - - 120
See Compensation under Elementary Education Act.

LEASE—Covenant not to assign - - 729
See Covenant not to assign.

—— Disclaimer by trustee in bankruptcy - 586
See Disclaimer in Bankruptcy.

LETTER—Posting of—Recovery by sender 27
See Bill sent by Post.

LEASEHOLDS FOR YEARS—Will—Contrary intention - - - - - 174
See Devise of "Lands."

LEX LOCI CONTRACTUS—Deposit of English deeds with German firm - - 722
See Deposit of Deeds.

LIABILITY—Partnership—Acceptance of bills by partner - - - - 635
See Authority of Partner.

LICENSE—To assign or underlet - - 729
See Covenant not to assign.

LIEN—Solicitor—Charge—Property received 654
See Solicitor's Lien.

LIFE INSURANCE—Commissioners for Reduction of National Debt - - - 397
See Commissioners for Reduction of National Debt.

—— Mutual insurance society - - 495
See Mutual Insurance Society.

LIGHT AND AIR—*Rule as to Forty-five Degrees.*] *Per* the *Lord Chancellor*:—The fact that the height of a building above an ancient light is not greater than its distance is not conclusive evidence that the light is not injuriously affected, but is *primâ facie* evidence of there being no such interference with the light as the Court will restrain, and requires to be rebutted by special evidence of injury.—Observations as to evidence

LIGHT AND AIR—*continued.*
relating to obstruction of air as well as light. CITY OF LONDON BREWERY COMPANY *v.* TENNANT [212

2. —— *Grant—Covenant for Quiet Enjoyment—Injunction against Breach of Covenant—Proof of Damage—Easement—Practice—Surveyor appointed by Court.*] There is no difference in the right of an owner of land to the ordinary easement of light, whether it is acquired by twenty years' user or by grant from the owner of the servient tenement; and if the grant is accompanied by a covenant for quiet enjoyment of the premises, such covenant does not enlarge the right of the covenantee so as to entitle him to an injunction in equity to restrain an obstruction where the damage is not sufficient to enable him to maintain an action at law.—But it is otherwise where the right to light claimed is not the ordinary easement, but a special right created by the covenant; in which case a Court of Equity will grant an injunction without regard to the amount of damage.—Where the Court was not satisfied from the evidence whether the wall proposed to be built by the Defendant would or not be a material obstruction to the Plaintiff's lights, the Court directed a temporary screen to be erected to the height of the proposed wall, and appointed a surveyor to report on the effect. LEECH *v.* SCHWEDER - - - - 463

—— School Board—Compensation - 120
See COMPENSATION UNDER ELEMENTARY EDUCATION ACT.

LIMITATIONS—Statute of—Express trust—Trustees of insurance society - - 495
See MUTUAL INSURANCE SOCIETY.

LIQUIDATION BY ARRANGEMENT—Action in tort against debtor—Injunction - 673
See INJUNCTION IN BANKRUPTCY.

—— Costs - - - - - - 144
See COSTS OF LIQUIDATION.

—— Notice to sheriff - - - 609
See EXECUTION CREDITOR. 4.

—— Refusal of Creditors to grant discharge 716
See DISCHARGE IN BANKRUPTCY.

—— Resolution—Validity—Agreement for composition - - - - - 583
See MEETING OF CREDITORS. 2.

—— Sale of property to liquidating debtor—After-acquired property - - - 716
See DISCHARGE IN BANKRUPTCY.

LOWER SCALE—Costs—Amount of mortgage debt - - - - - - 514
See TAXATION OF COSTS.

LUNACY—Appointment of new trustee—Female trustee - - - - 720
See TRUSTEE ACTS.

—— Inquisition—Inquiry when lunacy commenced - - - - 677
See INQUISITION IN LUNACY.

—— Person of unsound mind not so found—Suit by next friend - - 85, 373
See NEXT FRIEND. 1, 2.

MAJORITY OF SHAREHOLDERS—*Company—Minority—Pleading.*] Where the majority of a company propose to benefit themselves at the

MAJORITY OF SHAREHOLDERS—*continued.*
expense of the minority, the Court may interfere to protect the minority.—In such a case, the bill is rightly filed by one shareholder on behalf of the others and against the company.—Order of *Bacon*, V.C., affirmed. MENIER *v.* HOOPER'S TELEGRAPH WORKS - - - - - - 350

MANAGER—Company—Delegated power - 691
See AUTHORITY OF DIRECTORS.

MANDATORY INJUNCTION—*Injunction—Trespass—Highway—Water-pipes—Action at Law—Value—Motives.*] Where water-pipes had, without the consent of the owner of the soil, been laid in the soil of a highway, an injunction to restrain the continuance of the pipes was granted; the owner of the soil not being left to his remedy at law, and not being required to establish his right at law.—The facts that the soil under the highway was of no value to the owner, and that his motive for applying to the Court was not connected with the enjoyment of his land, were held not to be reasons against the granting of the injunction.—Decree of *Jessel*, M.R., affirmed.—*Deere* v. *Guest* (1 My. & Cr. 516) commented on. GOODSON *v.* RICHARDSON - - - 221

2. —— *Building completed—Successive Actions at Law.*] The trustees of a public road, in making an embankment across the Plaintiff's land, built buttresses encroaching on the land, and also turned water on to the land from want of sufficient drains. The Plaintiff brought an action and recovered damages, but the trustees continued the encroachment, and the Plaintiff gave them notice that he should bring fresh actions till they removed it. He then filed a bill for an injunction. The Court granted a mandatory injunction to restrain the trustees from continuing the encroachment and nuisance. HOLMES *v.* UPTON 214, n.

MARGINAL NOTES—Bankers—Order and disposition - - - - 383
See ORDER AND DISPOSITION. 1.

MARINE INSURANCE—Commission—Re-insuring - - - - - 525
See BROKER'S COMMISSION.

MARRIAGE SETTLEMENT—Covenant to settle future property - - - 97
See COVENANT TO SETTLE.

MARSHALLING—*Will—Mortmain Act—Direction to reserve the pure Personalty for Charity—Costs.*] A testator gave the residue of his personal estate, which consisted of both pure and impure personalty, to trustees upon trust to sell and convert the same into money, and out of the proceeds and out of his ready money to pay his debts, funeral expenses and legacies, and to pay the income to his wife for life, and after her death to raise sufficient to purchase certain life annuities. He then gave some pecuniary legacies, including a legacy of £100 to a charity school, and bequeathed all the residue of his personal estate to three charities in equal shares, and directed that the three last-mentioned bequests should be paid and satisfied out of such part of his personal estate as could be lawfully applied to the payment thereof and which should be reserved by his trustees for that purpose:—*Held* (reversing the decision of *Wickens* V.C.), that the direction respecting the payment of the

MARSHALLING—*continued.*
residuary bequests was equivalent to a direction to marshall the assets in favour of the three charities; and that the debts, funeral and testamentary expenses and legacies other than the legacy to the school, must be paid primarily out of the impure personalty:—That the direction to marshall did not apply to the legacy to the school, which must fail only in the proportion which the impure bore to the pure personalty:—That the costs of the suit were included under testamentary expenses, and must be paid primarily out of the impure personalty.—*Wills* v. *Bourne* (Law Rep. 16 Eq. 487) followed. Miles *v.* Harrison - - - - - - 316

MEETING OF CREDITORS—*Bankruptcy—Resolution for Composition—Assets exceeding Liabilities—Motive of Kindness towards Debtor—Dissentient Creditors—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 126, 127.] The statement of the debts and assets of a liquidating debtor shewed that his assets covered his liabilities, but his principal assets consisted of houses which were heavily mortgaged. The majority of creditors passed a resolution to accept a composition of 10*s.* in the pound. A dissentient creditor applied to set aside all the proceedings, producing evidence that the debtor had undervalued his property. The debtor filed an affidavit stating that his creditors accepted the composition with a full knowledge of the state of his property, and from a desire to assist him and prevent his being completely ruined, and also to avoid waiting for the realization of the property, which would have taken a considerable time:—*Held* (affirming the decision of *Bacon*, C.J.), that as the dissentient creditor, as well as the others, knew that the assets exceeded the liabilities, there was no ground for setting aside the proceedings. *Ex parte* Linsley. *In re* Harper - - - - - 290

2. —— *Bankruptcy—Liquidation by Arrangement—Resolution of Creditors—Clause authorizing Trustee to agree to a Composition—Bankruptcy Act*, 1869, *ss.* 20, 127—*Resolution partly ultra vires.*] A debtor, partner in a firm, having filed a petition for liquidation by arrangement, a general meeting of his creditors was held, at which the requisite majority of his joint and separate creditors passed a resolution agreeing to the liquidation, appointing a trustee and committee of inspection, and granting the debtor his discharge. The resolution also contained a clause authorizing the trustee to sell to the mother of the debtor his reversionary interest under his father's will at such a price as would pay the costs of the liquidation and a composition of 1*s.* in the pound to his separate creditors. This resolution was registered:—*Held*, that the clause authorizing the trustee to sell the reversionary interest was *ultrà vires* and void; but that the rest of the resolutions were not thereby rendered invalid, and that the liquidation must proceed in the ordinary course. *Ex parte* Browning. *In re* Marks - - - - - 583

MISJOINDER—*Dissolved Company—Shareholders—Creditor's Right to sue—Multifariousness—Demurrer ore tenus.*] A bill was filed against a railway company by a creditor and shareholder of the company on behalf of himself and all

MISJOINDER—*continued.*
other creditors and shareholders, and stated that under an Act of Parliament the company was to transfer its property to another railway company, and be dissolved, the purchasing company issuing to the selling company stock to a large amount; that the proceeds of the sale of the stock were to be applied by the selling company in discharge of certain liabilities, and the surplus was to be divided between the creditors and preferential shareholders; that the selling company had transferred its property, but had not paid its creditors or shareholders; and the bill prayed that the company might be wound up and the accounts taken:—*Held* (affirming the order of *Malins*, V.C.), that a demurrer to the bill for want of equity would not lie; but—*Held*, that the bill was demurrable for multifariousness and misjoinder, by reason of the adverse interests of the preferential and ordinary shareholders, and a demurrer *ore tenus* allowed. Ward *v.* Sittingbourne and Sheerness Railway Company 488

MEMORANDUM OF ASSOCIATION—Subscriber of
See Subscriber of Memorandum. [60

MISTAKE—Conveyance of more than grantor intended—General words—Admissions
See Proof of Seisin. [739

—— Law—Relief against - - - 609
See Execution Creditor. 4.

—— Proof in bankruptcy - - - 686
See Cross Acceptances.

MORAL OBLIGATION—After-acquired property—Inspectorship deed - - 33
See Inspectorship Deed.

MORTGAGE—Costs of mortgagee in interpleader suit - - - - - 736
See Interpleader.

—— Interest—Transfer - - - 541
See Interest on Mortgage.

—— Judgment Creditor—Law of Judgments Amendment Act - - - 229
See Judgment Creditor. 1.

—— Property occupied by partnership—Notice
See Constructive Notice. [79

—— Redemption suit—Discovery of accounts 69
See Discovery. 1.

—— Trade fixtures—Bill of sale—Underlease 76
See Registration of Bill of Sale.

—— Taxation of costs—Lower scale - 514
See Taxation of Costs.

MORTMAIN—Marshalling—Direction to reserve pure personalty for charity - 316
See Marshalling.

MOTIVE—Suit for injunction—Right to soil of highway - - - - 221
See Mandatory Injunction. 1.

—— Resolution for composition—Kindness towards debtor - - - 290
See Meeting of Creditors. 1.

MULTIFARIOUSNESS—Bill against dissolved company - - - - 488
See Misjoinder. 2.

MULTIPLICITY OF ACTIONS—Mandatory injunction - - - 214, n.
See Mandatory Injunction. 2.

MUTUAL CREDITS—*Bankruptcy—Set-off—Secured Debt—Bankruptcy Act*, 1869, *s.* 39.] *B. & Co.* had business transactions with a trader who

MUTUAL CREDITS—*continued.*
became bankrupt, and at the time of the bankruptcy the bankrupt owed *B. & Co.* £3010, and *B. & Co.* owed the bankrupt £88; but the bankrupt held goods of *B. & Co.* upon which he had a lien for that amount. The trustee in the bankruptcy insisted that *B. & Co.* should pay the debt of £88 before the goods were delivered up to them, and that they should prove for the whole sum of £3010 against the bankrupt's estate:—*Held* (reversing the decision of the Registrar), that *B. & Co.* were entitled to have the sum of £88 set off against their claim, so as to free the goods from the lien, and to prove for the balance against the bankrupt's estate. *Ex parte* Barnett. *In re* Deveze - - - - 293

MUTUAL INSURANCE SOCIETY—*Fund and Defendants out of Jurisdiction—Payment—Trustees—Statute of Limitations—Express Trust.*] A bill was filed against four trustees in *India* of a fund in *India*, and one formal Defendant in *England*, to recover money payable in *England*. The trustees were served out of the jurisdiction, appeared and answered, and entered into evidence:—*Held*, that as the Defendants had not demurred or pleaded or moved to discharge the order for service, the Court might determine the questions between the parties.—By resolutions of an association in the nature of a benefit society, certain pensions were to be given to the widows of the members, and each member was to pay to the association a percentage on his income. Six months afterwards the operation of these resolutions was suspended:—*Held*, that the widow of a member who had not paid or tendered the requisite percentage had no claim to a pension under the resolutions.—The funds of the association were vested in trustees:—*Held*, that neither they nor the association were trustees for the widow of any member, so as to prevent the claim from being barred by lapse of time.—Decree of *Bacon*, V.C., varied. Edwards *v.* Warden - 495

NAVIGABLE RIVER—Obstruction of - 423
See Obstruction of Navigation.

NEGLIGENCE—Marine insurance - - 525
See Broker's Commission.

NEXT FRIEND—*Suit by Person of Unsound Mind not found so by Inquisition—Lunacy.*] *B.* having become of unsound mind, his family applied to *S.*, his agent, to render accounts. *S.* consulted his solicitors, *M. & P.*, who in August, 1871, filed a bill in the name of *B.* by a next friend, who was a stranger to the family, against *S.* for an account. A receiver was appointed, and in December, 1871, without notice to the family, the cause was heard as a short cause, and a decree made directing accounts and inquiries. In March, 1872, *B.* was found lunatic, of which *M. & P.* had full notice. On the 8th of June, 1872, the Chief Clerk made his certificate, and on the 29th of June, 1872, the cause was heard on further consideration, and an order made directing the costs of both parties, as between solicitor and client, to be paid out of the moneys in the hands of the receiver. In the accounts of the receiver as passed were also included considerable sums for his poundage and for the employment of an accountant to investigate the books. Some time after the order on further consideration a committee was appointed in the lunacy:—*Held* (varying the order of *Wickens*, V.C.), on petition by the lunatic and his committee, that all the proceedings in the suit after the appointment of a receiver, were unauthorized and improper, and that all proceedings after the finding on the inquisition were irregular and void, and that *M. & P.* must make good to the lunatic's estate the sums paid to the accountant, and the sums paid to themselves and the Defendant's solicitors for costs (less the costs up to the appointment of the receiver), and must pay the costs of the Petition, both before the Vice-Chancellor and the Court of Appeal, as between solicitor and client. Beall *v.* Smith - - - - - 85

2. —— *Person of Unsound Mind—Partition Suit—Sale of Real Estate—Lunacy Regulation Act*, 1862 (25 & 26 *Vict. c.* 86), *s.* 13—*Trustee Act*, 1852, *s.* 1.] It is irregular for a bill to be filed by a person of unsound mind not so found by inquisition, by his next friend, for the purpose of dealing with the real estate of the person of unsound mind.—A bill was filed by a person of unsound mind not so found, by his next friend, for a partition or sale of real estate, and a decree for sale was made. A petition was afterwards presented under the *Trustee Act*, 1852, for an order vesting the estate of the Plaintiff in the purchaser. The Court refused to make the order, considering that the suit was irregular, but as the Plaintiff's share was only £200, and she had no other property, the Court directed an application to be made in Lunacy, under the 13th section of the *Lunacy Regulation Act*, 1862, for a sale, and permitted the petition to be amended for that purpose. Halfhide *v.* Robinson - - 373

NOMINAL DEFENDANT—Appeal by - 758
See Security for Costs.

NOTARY—Protest of bill of exchange - 591
See Notice of Dishonour.

NOTICE—Appeal motion—Vacating inrolment
See Inrolment of Decree. 1. [266

—— Constructive—Partnership property—Title of occupier - - - - 79
See Constructive Notice.

—— Directors of company—Sale of shares 691
See Authority of Directors.

—— Disclaimer of case by trustee in bankruptcy
See Disclaimer in Bankruptcy. [586

—— Insolvency—Payment on eve of bankruptcy - - - - 595
See Fraudulent Preference. 1.

—— Interest of tenant—Specific performance 447
See Notice of Tenant's Interest.

—— Right of Way - - - - 111
See Substituted Way.

—— Sheriff in possession—Petition for liquidation - - - - - 609
See Execution Creditor. 4.

NOTICE OF DISHONOUR—*Bankruptcy—Adjudication—Evidence—Appeal—Foreign Bill of Exchange—Protest by Notary.*] Where it is intended to rely on the insufficiency of the evidence of trading or other facts to impeach the validity of

NOTICE OF DISHONOUR—*continued.*
an adjudication of bankruptcy, the objection ought to be taken in the first instance, when the insufficiency may be cured by additional evidence. The holder of a foreign bill of exchange which was dishonoured by the acceptor, had it duly presented and protested by a notary public. In the notice of dishonour which he sent to the drawer he informed him that the bill had been "duly presented for payment and returned dishonoured," but made no mention of the protest by the notary:—*Held*, that the notice of dishonour was sufficient. *Ex parte* Lowenthal. *In re* Lowenthal (No. 2) 591

NOTICE OF TENANT'S INTEREST—*Vendor and Purchaser—Specific Performance—Tenancy—Inquiry.*] The conditions of sale of a public-house stated that it was in the occupation of a tenant. A brewer, intending to use the public-house for the sale of his beer, agreed to buy it. He afterwards learnt that it was under lease to another brewer for a term of which eight years were unexpired:—*Held* (affirming the decree of the Master of the Rolls), that the purchaser was not bound to ascertain from the tenant the terms of his tenancy: and that in such a case the vendor could not enforce specific performance. *James* v. *Lichfield* (Law Rep. 9 Eq. 51) observed upon. Caballero *v.* Henty - - - 447

NUISANCE—Obstruction of river - - 423
See Obstruction of Navigation.

—— Smoke - - - - - 705
See Smoke.

OBSTRUCTION OF NAVIGATION — *Navigable River — Nuisance — Injunction — Conservators — Benefit of Trade.*] A wharf-owner drove piles into the bed of a river, extending the wharf so as to occupy three feet out of a breadth of about sixty feet available for navigation:—*Held*, that this was such an obstruction as would be restrained at the suit of a municipal corporation empowered by Act of Parliament to remove obstructions.—Decree of the Master of the Rolls affirmed.—*Held, per* the Master of the Rolls, that an owner of land at the side of a public navigable river has no right to erect on the bed of the river, for the benefit of his own trade, any structure, whether any actual obstruction to the navigation of the river will or will not be thereby occasioned; and any benefit to his own trade is too remote to be held for the advantage of the public generally, and so to justify the erection. *Rex* v. *Russell* (6 B. & C. 566) disapproved of by the Master of the Rolls. Attorney-General *v.* Terry - - 423

OBSTRUCTION OF RIGHT OF WAY—Obstruction by grantor—Right to deviate - 111
See Substituted Way.

OCCUPIER—Notice of title of - - 79
See Constructive Notice.

OFFICIAL LIQUIDATOR — *Payment of Costs.*] Where an application of an official liquidator is refused with costs the order will be that the official liquidator do pay the costs. *In re* Paraguassu Steam Tramroad Company. Ferrao's Case - - - - - - 355

2. —— *Winding-up—Costs.*] Where the official liquidator of a company appears as a Respondent in an appeal in the winding-up, and his costs are

OFFICIAL LIQUIDATOR—*continued.*
not payable by any party to the appeal, they will not be given out of the estate by the Court of Appeal; but he will be left to apply for them to the Judge of the Court below, who will order payment of them out of the estate unless he sees reason to the contrary. *In re* Wheal Vyvyan Mining Company. Wescomb's Case - 553

ORDER—Inrolment of—Application to discharge order - - - - 480
See Inrolment of Decree. 3.

ORDER AND DISPOSITION — *Bankruptcy — Bankers' "Marginal Notes"—Debts due in the course of Trade—Bankruptcy Act*, 1869, *s.* 15, *sub-s.* 5.] Sums retained by bankers against acceptances, and for which they have given marginal notes, are not debts due to the bankrupt in the course of his business within the order and disposition clause, *Bankruptcy Act*, 1869, s. 15, sub-s. 5. The expression "debts due" in that clause is not to be confined to debts presently payable, but, on the other hand, will not include debts which were only contingent at the commencement of the bankruptcy. *Ex parte* Kemp. *In re* Fastnedge - - - - 383

2. —— *Bankruptcy — Reputed Owner — Purchaser's Goods in the Bonded Warehouse of a third Party in the name of the Vendor—Custom of Trade—Delivery Order—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 15, *sub-s.* 5.] At the time of the presentation of a petition for liquidation by arrangement certain butts of whisky which had been sold by the debtors to the Appellants were lying in the bonded warehouse of a third person at *Leith*, in the name of the debtors. No delivery order had been given to the purchasers before the filing of the petition, and they were ignorant in what warehouse the whisky was lying:—*Held* (reversing the decision of the Chief Judge in Bankruptcy), that the principle of *Ex parte Watkins* (Law Rep. 8 Ch. 520) applied, and that the custom of the spirit trade excluded the reputation of ownership, although the whisky was in the warehouse of a third party and not in that of the vendors:—*Held*, also, that the fact of the delivery order not having been given to the purchasers before the commencement of the liquidation did not raise a reputation of ownership in the vendors. *Ex parte* Vaux. *In re* Couston - - - - - 602

3. —— *Bankruptcy—Reputed Owner—Goods sold and taken back on Hire—Bankruptcy Act*, 1869, *s.* 15, *sub-s.* 5.] A draper in *London*, being the owner of household furniture which was in his dwelling-house and shop, signed a written agreement by which he sold the furniture to a furniture dealer and hired it back at a rent of 12*s.* 6*d.* a week. He remained in the use and occupation of the furniture under the agreement for more than four years, and then filed a petition for liquidation, under which a trustee was appointed:—*Held*, that the furniture was in the order and disposition of the debtor as the reputed owner at the commencement of the liquidation, and that the trustee was entitled to it.—*Lingham* v. *Biggs* (1 B. & P. 82) and *Lingard* v. *Messiter* (1 B. & C. 308) followed. *Ex parte Watkins* (Law Rep. 8 Ch. 520) distinguished. *Ex parte* Lovering. *In re* Jones (No. 2) - - - 621

PACKING OF GOODS—Apparent possession—Bill of sale - - - - 697
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See CONTRACT FOR PAID-UP SHARES.
—— Payment by money's worth - - 355
See PAYMENT FOR SHARES BY MONEY'S WORTH.
—— Qualification of director - - 102
See QUALIFICATION OF DIRECTOR.
—— Subscriber of memorandum - - 60
See SUBSCRIBER OF MEMORANDUM.
PARTITION SUIT — Person of unsound mind—Next friend - - - - 373
See NEXT FRIEND. 2.
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See AUTHORITY OF PARTNER.
—— Bankruptcy — Proof against co-partner—Devastavit - - - - 626
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—— Bankruptcy—Husband and wife - 508
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See JOINT CONTRACT.
—— Property occupied by firm—Mortgage 79
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—— Sealing of—Priority - - 631, 633
See SEALING OF PATENTS. 1, 2.
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See WINDING-UP PETITION.
—— Debtor's summons—Creditor's debt—Receiver - - - - 133
See DEBTOR'S SUMMONS. 1.
—— Execution creditor—Payment before seizure
See EXECUTION CREDITOR. 1. [301
—— Shares—Money's worth - - 355
See PAYMENT FOR SHARES BY MONEY'S WORTH.
PAYMENT INTO COURT—To abide the event of action—Bills of Exchange Act - 379
See CREDITOR HOLDING SECURITY.
PAYMENT FOR SHARES BY MONEY'S WORTH —*Contributory—Paid-up Shares—Compromise—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.] An action was brought against a company formed before the passing of the *Companies Act*, 1867, and the company submitted to judgment for a sum of money, part of which was to be paid by crediting a certain shareholder with a sum sufficient to make his shares fully paid up. An order was soon afterwards made for winding up the company:—*Held*, that the shareholder was not a contributory in respect of these shares as not fully paid:—*Held*, also, that the case did not come within the provisions of the *Companies Act*, 1867, as to paid-up shares. Order of *Bacon*, V.C., affirmed. *In re* PARAGUASSU STEAM TRAMROAD COMPANY. FERRAO'S CASE - - - 355
PERMANENT IMPROVEMENTS — Proceeds of sale of timber—Settled Estates Act 681
See SETTLED ESTATES ACT.
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See WINDING-UP PETITION.
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—— Misjoinder - - - - 488
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See COMMISSIONERS FOR REDUCTION OF NATIONAL DEBT.
POSSESSION—Apparent—Bill of sale - 697
See APPARENT POSSESSION.
—— Cutting timber - - - - 116
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POST OFFICE—Recovery of letters by sender—French post office - - - 27
See BILL SENT BY POST.
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See SECURITIES FOR BILLS OF EXCHANGE.
—— Appointment of new trustee - - 720
See TRUSTEE ACTS.
—— Bankruptcy—Costs of trustee - 479
See TRUSTEE IN BANKRUPTCY.
—— Bankruptcy—Debtor's summons—Affidavit
See DEBTOR'S SUMMONS. 2, 4. [298, 324
—— Bankruptcy—Re-hearing - 127, 305, 667
See RE-HEARING IN BANKRUPTCY. 1—3.
—— Concurrent suits—Transfer of cause 52, 287
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—— Costs—Two suits in—Nature of interpleader
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See HEARING IN CAMERÂ.
—— Injunction—Light and air—Appointment of surveyor by the Court - - 463
See LIGHT AND AIR. 2.
—— Inrolment—Enlarging time—Death of Defendant - - - - 269
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—— Inrolment—Interlocutory order - 480
See INROLMENT OF DECREE. 3.
—— Inrolment—Vacating inrolment - 266
See INROLMENT OF DECREE. 1.
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See INQUISITION IN LUNACY. [677
—— Next friend—Person of unsound mind
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—— Settled Estates Act - - - 681
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—— Patents - - - - 631, 633
See Sealing of Patents. 1, 2.
PRIVATE HEARING - - - - 522
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PRIVATE LETTERS—Suit to restrain publication - - - - - 522
See Hearing in Camerâ.
PRIVATE TRANSACTIONS—Discovery - 376
See Discovery. 3.
PRODUCTION OF DOCUMENTS—*Affidavit—Time—Bill dismissed.*] Where a Plaintiff, after an order for the production of documents, persisted in not filing a sufficient affidavit as to documents, the Court fixed a time at which the bill should, in default of a sufficient affidavit, stand dismissed, and the money in Court be repaid to the Defendant who paid it in.—Order of *Malins*, V.C., affirmed. Republic of Liberia *v.* Imperial Bank - 569
PROLONGATION OF COPYRIGHT—*Author—Owner—Trustee*—5 & 6 *Vict. c.* 45, *s.* 4.] Seven persons, acting under the direction of trustees for a charity, compiled a book, which was registered in their names, but was published by and for the profit of the charity:—*Held*, that the executor of the survivor of the seven compilers had not obtained the benefit of the extended term of copyright granted by 5 & 6 Vict. c. 45, s. 4.—Order of the Master of the Rolls affirmed. Marzials *v.* Gibbons - - - - - 518
PROOF AGAINST CO-PARTNER—*Bankruptcy—Proof on behalf of deceased Partner's Estate—Devastavit by Executor of deceased Partner—Business carried on by surviving Partner.*] By articles of partnership between *W.* and *T.*, it was provided that all the then existing capital, including the premises at which the business was carried on, should belong to *W.* *W.*, by his will, appointed *T.* and others his executors, and gave his executors a limited power to carry on the business. *T.* alone proved, and carried on the business at the old premises, and committed a devastavit by misapplying some of the separate property of *W.* *W.'s* estate was insolvent, and was being wound up in Chancery. *T.'s* estate was being wound up under a liquidation by arrangement, in which the joint estate of the late firm was also dealt with:—*Held*, that a proof could be sustained in the liquidation on behalf of *W.'s* estate against the separate estate of *T.* in respect of the devastavit, notwithstanding the rule against a partner proving against the separate estate of his co-partner. *Ex parte* Westcott. *In re* White - - - 626
PROOF IN BANKRUPTCY—Bills of exchange—Accommodation bills - - 686
See Cross Acceptances.
—— Creditor holding security - - 379
See Creditor holding Security.
—— Debt capable of being estimated - 670
See Debt capable of being estimated.
PROOF IN BANKRUPTCY—*continued.*
—— Mutual credits - - - - 293
See Mutual Credits.
—— Partnership—Devastavit - - 621
See Proof against Co-partner.
PROOF OF SEISIN—*General Devise—Evidence—Admissions—Setting aside Deed—Purchaser for Valuable Consideration—Jurisdiction.*] A testator, who died in 1760, made a general devise of freeholds and copyholds to his daughter in tail. His grandson was in 1783 admitted to the copyholds as tenants in tail, and was proved to have been in 1833 in possession of the copyholds and of certain freeholds then held therewith. He made a will purporting to devise these freeholds and the copyholds, and died in 1840. His brother and heir in 1841 executed a deed purporting to be for the purpose of barring any estates tail in the freeholds, whereby he conveyed the freeholds to the devisee under the will, and covenanted to surrender the copyholds. This deed was not inrolled, but the devisee was admitted to the copyholds. The devisee died intestate, and his brother succeeded him as his heir, and made a will purporting to devise the freeholds and the copyholds in fifths, the Plaintiff taking one fifth and the Defendant another fifth. The Defendant afterwards agreed to buy the Plaintiff's one-fifth, and a conveyance was made by her conveying to the Defendant her one-fifth and all her estates and shares in the land, neither of them being aware of the earlier title. Four years afterwards the deed purporting to bar the estate tail was found, and thereupon the Defendant requested the Plaintiff, who was heir in tail of the original testator, to confirm the sale, and sent to her the draft of a deed reciting that the original testator was seised in fee of the freeholds and devised them, and that she was tenant in tail. She then filed a bill to have her conveyance set aside and to be declared tenant in tail of the freeholds:—*Held*, that the conveyance by the Plaintiff of the fee in the whole when she had intended to convey one-fifth only might embarrass her in proceeding at law, and that this Court must determine the question; but—*Held*, that the Plaintiff was bound to shew that the original testator was seised in fee of the freeholds claimed by her, and that as she had not done so, her bill must be dismissed:—*Held*, that, under the circumstances, the sending by the Defendant of the draft deed stating that the original testator was seised in fee was not an admission by the Defendant of the fact.—The effect of admissions discussed.—The Defendant had conveyed his estate to mortgagees:—*Held*, that they, as purchasers for valuable consideration without notice, could not be interfered with.—Decree of *Bacon*, V.C., affirmed. Bulley *v.* Bulley 739
PROTECTED TRANSACTION—Bankruptcy—Execution creditor - - - 409
See Execution Creditor. 2.
PROVABLE DEBT—Debt capable of being estimated - - - - 670
See Debt capable of being estimated.
PUBLIC BENEFIT—Obstruction of river - 423
See Obstruction of Navigation.
PUBLIC POLICY—Gift to illegitimate children
See Illegitimate Children. [147

PUBLICATION—Private letters - - 522
See HEARING IN CAMERÂ.

QUALIFICATION OF DIRECTOR — *Company — Contributory—Paid-up Shares—Companies Acts,* 1862 *and* 1867.] Where the holding of a certain number of shares is a necessary qualification for a director, merely acting as a director does not amount to a contract by the person so acting to take that number of unpaid shares directly from the company.—Each of the directors of a company was obliged to hold fifty shares. *B.*, at the request of the promoter of the company, assented to become a director and attended a meeting. By the direction of the promoter, who was entitled to a large number of paid-up shares in the company, paid-up shares sufficient for the qualification of a director were registered in *B.*'s name:—*Held*, that any implied contract by *B.* to take shares was fulfilled by his acquiring shares in that manner:—*Held*, that, under the circumstances, the shares registered in his name must be taken to have been so registered in order to qualify him as a director, or else that the agreement under which he became a director was not complied with, and he was not a shareholder.—Order of *Wickens*, V.C., affirmed.—*Marquis of Abercorn's Case* (4 D. F. & J. 78) and *Leeke's Case* (Law Rep. 6 Ch. 469) considered. *In re* METROPOLITAN PUBLIC CARRIAGE AND REPOSITORY COMPANY. BROWN'S CASE - - - 102

RAILWAY COMPANY—Agreement to construct works—Specific performance—Damages [279
See SPECIFIC PERFORMANCE—CONSTRUCTION OF WORKS.

—— Costs under Lands Clauses Act - 263
See COSTS UNDER LANDS CLAUSES ACT.

—— Use of railway—Specific performance 831
See SPECIFIC PERFORMANCE—CONTINUOUS ACTS.

RECEIVER—Bankruptcy—Debtor's summons 133
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RECITALS IN DRAFT DEED—Admissions 739
See PROOF OF SEISIN.

RECONSTRUCTION OF COMPANY — *Agreement to assign the Assets to a Promoter of a New Company — Ultrà vires — Companies Act,* 1862, *s.* 161.] The directors of a company entered into an agreement with *A.* to sell him the business and assets of the company, upon the terms that the directors should forthwith call an extraordinary meeting and endeavour to get the sanction of the shareholders to the carrying out the sale, and that on such sanction being obtained he should pay the directors £250 in cash, and if he should succeed in establishing a new company for the same purpose, should, within three months from the allotment of shares, pay a further sum of £1250 in cash, and £2000 in fully paid-up shares of the new company. The company, at an extraordinary general meeting, passed a resolution for affixing the seal of the company to the agreement, which was done, and *A.* paid the £250:—*Held*, on bill by a dissentient shareholder (affirming a decree of *Bacon*, V.C.), that the agreement was *ultrà vires* and invalid, and that

RECONSTRUCTION OF COMPANY—*continued.*
effect could not be given to it under sect. 161 of the *Companies Act*, 1862, for that that section only authorizes a sale to a company, not to a person about to form a company. BIRD *v.* BIRD'S PATENT DEODORIZING AND UTILIZING SEWAGE COMPANY - - - - - 358

RECTIFICATION OF REGISTER—*Removing Name of Shareholder—Fraud—Action at Law—Discretion under Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *s.* 35.] Where a holder of fully paid-up shares applied to have his name removed from the list of shareholders, alleging that he was induced to take shares by fraud, and the facts alleged by him were denied by the company, the Court refused to make any order under the 35th section of the *Companies Act*, 1862, until the applicant had tried the question at law in an action to recover what he had paid on the shares.—Order of *Malins*, V.C., discharged. *In re* RUBY CONSOLIDATED MINING COMPANY. ASKEW'S CASE 664

RECTORY—Rebuilding—Proceeds of sale under Lands Clauses Act - - 684
See REINVESTMENT OF PURCHASE-MONEY.

REDUCTION OF CAPITAL OF COMPANY—30 & 31 *Vict. c.* 131, *s.* 9—*Special Resolution altering Memorandum of Association.*] Where the original regulations of a company do not authorize a reduction of the capital of a company, there must be a separate special resolution varying the regulations before a resolution can be passed under the 9th section of the *Companies Act*, 1867, reducing the capital. *In re* WEST INDIA AND PACIFIC STEAMBOAT COMPANY - - - 11, n.

REGISTER—Rectification of - - 664
See RECTIFICATION OF REGISTER.

REGISTRATION—Bill of sale - - 576
See REGISTRATION OF BILL OF SALE.

—— Resolution for liquidation—Void clause 583
See MEETING OF CREDITORS. 2.

REGISTRATION OF BILL OF SALE—*Bankruptcy—Bills of Sale Act* (17 & 18 *Vict. c.* 36)—*Trade Fixtures — Mortgage by Underlease — Power of Sale.*] *J.*, the lessee of a public-house and two cottages, who was bound by the covenants of his lease to deliver up, at the expiration of the term, all fixtures, except trade fixtures, demised by way of mortgage the public-house and premises, including all the tenant's fixtures, to a mortgagee for all the residue of the term except the last three days. The deed contained a power to the mortgagee, in case of default, to sell the premises or any part thereof, either together or in parcels, and either for the term thereby granted or for the original term, with a declaration that in case of a sale the mortgagor should hold the last three days of the term in trust for the purchaser. *J.* filed a petition for liquidation, and a trustee was appointed:—*Held*, that the mortgage deed gave no power to the mortgagee to sell or take possession of the fixtures separately from the buildings, and that therefore it did not require to be registered under the *Bills of Sale Act.*—The true test whether a mortgage deed of a building and fixtures requires registration under the *Bills of Sale Act* as respects the fixtures, is, whether it gives power to the mortgagee to sell or take pos-

REGISTRATION OF BILL OF SALE—*continued.*
session of the fixtures separately from the building.—*Ex parte Daglish* (Law Rep. 8 Ch. 1072) distinguished. *Ex parte* Barclay. *In re* Joyce 576

RE-HEARING IN BANKRUPTCY—*Appeal—Re-hearing by Registrar—Practice.*] A Registrar sitting as Chief Judge may re-hear a case, although his order has been appealed from and varied by the Court of Appeal, if the special point to be re-argued was not dealt with on the appeal. *Ex parte* Mackay. *In re* Jeavons 127

2. —— *Bankruptcy—Re-hearing—Bankruptcy Act*, 1869, *s.* 71—*Bankruptcy Rules*, 1870, *r.* 143.] Although a re-hearing before the same Judge who originally heard the case is not within Rule 143 of the *Bankruptcy Rules*, 1870, yet the Court in granting a re-hearing will have regard to that rule, and will not in general grant a re-hearing after twenty-one days, unless the party seeking a re-hearing can satisfactorily account for the delay. *Ex parte* Brown. *In re* Jeavons [304

3. —— *Practice—Extent of Jurisdiction—Pendency of Appeal—Additional Evidence on Appeal—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 71.] On an application to direct a re-hearing of a case by the County Court Judge, it was held by the Chief Judge in Bankruptcy that the jurisdiction to re-hear, given by sect. 71 of the *Bankruptcy Act*, 1869, in a proper case, was almost without limit; and that the fact that an appeal from the original order was pending did not prevent the Court from re-hearing the case. But the Chief Judge held that under the circumstances the County Court Judge was right in refusing the re-hearing. He also affirmed the original order.—On appeal from both orders, the Lords Justices affirmed the order refusing a re-hearing, and heard the other appeal with additional *vivâ voce* evidence. *Ex parte* Keighley. *In re* Wike - - - - - 667

RE-HEARING IN CHANCERY—Inrolment of interlocutory order - - - 480
See Inrolment of Decree. 3.

REINVESTMENT OF PURCHASE-MONEY—*Building Rectory—Tenant for Life*—8 *Vict. c.* 18, *s.* 69.] An arrangement was, with the consent of all proper parties, made for the rebuilding of a rectory house, part of the money to be advanced by the Commissioners of Queen *Anne's* Bounty, and part to be supplied by money agreed to be paid by a railway company for a piece of the glebe. The rebuilding proceeded, but the railway company were unable to pay, and the money required was advanced by the rector. When the railway company had paid the money, the rector petitioned to have it paid to him:—*Held*, that the Court had no power to make the order.—*Quære*, whether money arising from the sale of glebe land can, under the *Lands Clauses Consolidation Act*, be applied towards the rebuilding of a rectory. Williams *v.* Aylesbury and Buckingham Railway Company - - - - 684
—— Settled Estates Act - - - 681
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REMAINDER—Seizure by sheriff - - 369
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REPUTATION—Paternity—Illegitimate children.
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RESOLUTION—Company—Altering articles of association - - - - 54
See Surrender of Shares.
—— Company—Increase of capital—Issue of new shares - - - - 1
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—— Company—Reduction of capital - 11, n.
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—— Composition with creditors—Motives of kindness towards debtor - - 290
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—— Rights of riparian owners—Canal company—Sale of water - - - 451
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SALE—Assets of company—*Ultrà vires* - 358
See Reconstruction of Company.
—— Execution creditor—Payment of proceeds—Sale on successive days - - 432
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—— Partnership business - - - 192
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SCHOOL BOARD—Land injuriously affected—Lights - - - - 120
See Compensation under Elementary Education Act.

SCIENTIFIC EVIDENCE—Smoke - - 705
See Smoke.

SEALING OF PATENT—*Rival Applicants—Date of Patent.*] Applications were made for two patents for inventions alleged to be similar. The second applicant obtained a patent. The first applicant then presented a petition to have the Great Seal affixed to letters patent for his invention, alleging that his delay had been caused by the representations of the second applicant, and also that the inventions were not similar.—The Lord Chancellor examined the provisional specification of the first applicant, and the complete specification of the second applicant, and finding no substantial similarity between the inventions, directed the letters patent of the first applicant to be sealed. *In re* Harrison - 631

2. —— *Rival Applicants—Same Date—Witnesses.*] Where rival applicants had applied on the same day for patents, and had afterwards mutually agreed to withdraw opposition, letters patent bearing date the day of application were granted to one applicant, although letters patent bearing that date had already been granted to the other.—On the hearing before the Lord Chancellor of a petition for the Great Seal to be

SEALING OF PATENT—*continued.*
affixed to letters patent, witnesses may be examined *vivâ voce*. *In re* GETHING - - 633

SECURED DEBT—Bankruptcy—Mutual credits
See MUTUAL CREDITS. [293

—— Debtor's summons - - - 312
See DEBTOR'S SUMMONS. 3.

—— Money paid into Court - - - 379
See CREDITOR HOLDING SECURITY.

SECURITIES FOR BILLS OF EXCHANGE—*Doctrine of Ex parte Waring—Unaccepted Bills—Right of Double Proof—Practice—Appeal by one of two Defendants.*] *R. & Co.*, of *Brazil*, in the course of exchange operations with *A.*, of *Manchester*, drew bills on him for £2000, which they sold to the Plaintiff, and about the same date transmitted to *A.* acceptances of another house for £1900 to cover the bills drawn. Before the covering remittances reached *England*, *R. & Co.* stopped payment and presented a petition for liquidation. *A.* being also in difficulties, refused to accept the bills drawn on him and also became a liquidating debtor. The Plaintiff, as holder of the dishonoured bills, filed a bill against the trustees of the estates of *R. & Co.* and *A*, praying that the remittances might be applied in payment of the bills:—*Held* (reversing the decision of *Bacon*, V.C.), that the Plaintiff had no equity to support the bill.—The doctrine of *Ex parte Waring* (19 Ves. 345) does not apply to a case where the bills drawn by one of the insolvent firms on the other have not been accepted, nor in any other case in which the holder of the bills has no right of double proof against the two firms.—*Ex parte Smart* (Law Rep. 8 Ch. 220) distinguished.—On bill by *P.* against *R.* and *A.*, who all separately claimed the same property, decree made in favour of *P.* On appeal by *A.* alone, the Court being of opinion that *R.* was entitled, dismissed the bill against both Defendants. VAUGHAN *v.* HALLIDAY [561

SECURITY FOR COSTS—*Appeal—Nominal Defendant.*] The Court has jurisdiction to make a Defendant who is appealing give security for the costs of the appeal, and will, where the Defendant is not a man of substance, and is merely a nominal Defendant, stay the appeal until security is given. CORPORATION OF HASTINGS *v.* IVALL - 758

SEIZURE AND SALE — Execution creditor — Bankruptcy - - - 432
See EXECUTION CREDITOR. 3.

SEPARATE ESTATE—Bankruptcy of married woman - - - - 307
See BANKRUPTCY OF MARRIED WOMAN.

SEPARATION DEED—Bankruptcy—Void condition—Proof in bankruptcy - 670
See DEBT CAPABLE OF BEING ESTIMATED.

SEQUESTRATION—*Practice—Deposit on Appeal.*] Where the deposit on an appeal had been ordered to be returned to the Appellant, and before it was paid to him sequestration was issued against him for non-payment of costs previously due, the deposit was ordered to be paid to the sequestrators instead of the Appellant. CONN *v.* GARLAND 101

SERVICE OUT OF JURISDICTION — Bombay Civil Service Fund - - 495
See MUTUAL INSURANCE SOCIETY.

SET-OFF—Bankruptcy - - - 293
See MUTUAL CREDITS.

SETTLED ESTATES ACT (19 & 20 *Vict. c.* 120), *s.* 23—*Timber Money—Permanent Improvements.*] Under the *Settled Estates Act* (19 & 20 Vict. c. 120), s. 23, money arising from timber cut under an order of the Court was ordered to be expended in erecting new farm buildings and other permanent improvements of the property. *In re* NEWMAN'S SETTLED ESTATES - - - - 681

SETTLEMENT — Marriage — Covenant to settle future property - - - 97
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—— Shifting clause - - - - 237
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SHARES — Application for—Amalgamation of companies - - - - 392
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—— Infant—Father buying in his son's name 414
See INFANT TRANSFEREE.

—— Paid-up—Contract for - - 554
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—— Paid-up—Payment by money's worth - 355
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—— Paid-up—Qualification of director - 102
See QUALIFICATION OF DIRECTOR.

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—— Purchase by manager of company - 691
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—— Surrender of - - - - 54
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—— Transfer of—Calls in arrear - - 257
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—— Transfer to infant - - - 414
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SHAREHOLDERS—Bill by—Conflicting rights
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—— Dissentient - - - - 1
See AMALGAMATION OF COMPANIES. 1.

—— Power of majority to bind minority - 350
See MAJORITY OF SHAREHOLDERS.

SHERIFF—Erroneous return by—Seizure of remainder - - - - 369
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—— Execution—Payment of debt before seizure
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—— Notice of act of bankruptcy - - 409
See EXECUTION CREDITOR. 2.

—— Notice of petition for liquidation - 609
See EXECUTION CREDITOR. 4.

—— Sale to execution creditor - - 432
See EXECUTION CREDITOR. 3.

SHIFTING CLAUSE—*Will—Re-settlement—Diminution of Quantity of Estate.*] A testator gave his *Pembrokeshire* estates in trust for *T. C.* (second son of *S. C.*) for life, with remainder to his first and other sons successively in tail male, with remainder to the Plaintiff for life, with remainders over; and declared that if *T. C.* or his issue male should become entitled in possession to the estates in *Shropshire* settled on the marriage of *S. C.* (the father of *T. C.*), the trust for *T. C.* and his issue male should cease, and the *Pembrokeshire* estates

SHIFTING CLAUSE—*continued.*
should go to the person next entitled in remainder, as if *T. C.* were dead without issue. At the date of the will the *Shropshire* estates stood limited, under *S. C.'s* marriage settlement, to the use of *S. C.* for life, with remainder to his first and other sons successively in tail male.—*S. C.* and his eldest son disentailed the *Shropshire* estates, and limited a small portion of them to *S. C.* in fee, and re-settled the rest to such uses as *S. C.* and his eldest son should appoint, with remainder to *S. C.* for life, with remainder to his eldest son for life, with remainder to his first and other sons in tail male, with remainder to such uses as *S. C.* and *T. C.* should appoint, with remainder to *T. C.* for life, with remainder to his first and other sons in tail male. By this settlement powers were given to *S. C.*, to his eldest son, and to *T. C.*, to charge certain sums on the estate. *S. C.'s* eldest son died without issue, and then *S. C.* and *T. C.*, in exercise of their joint power of appointment, re-settled the *Shropshire* estates after the death of *S. C.* to the use of the eldest daughter of *T. C.* for life, with divers remainders over until the entail in the *Pembrokeshire* estates should be barred, and as soon as that event should happen, to the use of *T. C.* for life, with remainder to his first and other sons in tail male. On the death of *S. C.* the Plaintiff claimed to be let into possession of the *Pembrokeshire* estates, on the ground that the shifting clause had taken effect:—*Held*, that, inasmuch as *T. C.* acquired an interest in the *Shropshire* estates under what was substantially a new title, and the estates were, moreover, diminished in quantity, the shifting clause did not take effect. Meyrick *v.* Laws. Meyrick *v.* Mathias - - 237

SIMILAR INVENTIONS—Sealing of patents 631
See Sealing of Patent. 1.

SMOKE — *Nuisance — Injunction — Stoppage of Commercial Works—Damage, Extent of—Issue—Expert, Employment of, to report.*] Bill by Plaintiff, seeking, on the ground of smoke nuisance, to stop a large commercial work, dismissed upon the facts with costs.—The following subjects discussed:—1. The extent and character of the damage necessary to sustain a bill.—2. The province of scientific evidence.—3. The effect of the previous existence of similar nuisances.—4. The circumstances under which the Court will direct an issue, or send an expert to report.—Decree of the Master of the Rolls affirmed. Salvin *v.* North Brancepeth Coal Company - 705

SOLICITOR—Liability of—Breach of trust—Constructive trustee - - - 244
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—— Lien—Charge—Property received - 654
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SOLICITOR'S LIEN—23 *& 24 Vict. c.* 127, *s.* 28—*Charge on Property recovered or preserved.*] A bill was filed alleging that the Defendant had built so as to obstruct the Plaintiff's ancient lights, and was proceeding to build so as further to obstruct them, and asking for an injunction against further building, and a mandatory injunction to pull down part of what had been built. An interlocutory injunction was granted against building higher, and the suit was afterwards compromised on the terms that the building should remain of its then height. The Defendant having become bankrupt, his solicitor petitioned to have his costs made a charge on the Defendant's property to which the suit related:—*Held* (affirming the decision of the Master of the Rolls), that no property had been recovered or preserved within the meaning of 23 & 24 Vict. c. 127, s. 28.—A suit which only relates to an easement is not a suit in which it can be said that property is recovered or preserved, even though a mandatory injunction for pulling down buildings is refused. Foxon *v.* Gascoigne - - - - - 654

SPECIFIC PERFORMANCE—CONSTRUCTION OF WORKS—*Damages.*] A railway company agreed, for valuable consideration, with a landowner to erect, construct, and fit up a station on certain lands which they had bought from him. The agreement contained no further description of the station, nor any stipulations as to the use of it. The company having refused to erect a station in the specified place, and substituted one at a distance of two miles:—*Held* (affirming the decision of *Bacon*, V.C.), that the case was one in which justice could be better done by an inquiry as to damages than by a decree for specific performance. Wilson *v.* Northampton and Banbury Junction Railway Company - - - - - 279

SPECIFIC PERFORMANCE—CONTINUOUS ACTS—*Railway Clauses Act*, 1845, *ss.* 76, 92—*Use of Railway—Injunction.*] A railway company having refused to allow the Plaintiffs to run engines and carriages over part of their line under the powers of the *Railways Clauses Act*, 1845, s. 92, the Plaintiffs filed their bill for an injunction to restrain the company from preventing their exercise of the right:—*Held* (affirming the decision of *Hall*, V.C.), that, inasmuch as the Plaintiffs could not run over the line unless the points and signals on the line were properly worked by the railway company, this Court could not grant relief, as it does not order the performance of a continuous act like working signals, the doing of which requires continuous attention, and cannot be seen to by the Court. Powell Duffryn Steam Coal Company *v.* Taff Vale Railway Company - - - - - 331

STATUTES:
10 Geo. 4, c. 24—*Reduction of National Debt* [397
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8 Vict. c. 16, s. 16—*Companies Clauses* 257
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32 & 33 Vict. c. 71, s. 16 - - 379
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—— —— s. 71 - - - 305, 667
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—— —— s. 72 - - - - 192
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33 & 34 Vict. c. 75, ss. 19, 20—*Elementary Education* - - - - 120
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33 & 34 Vict. c. 93, s. 12—*Married Woman* 307
See BANKRUPTCY OF MARRIED WOMAN.

SUBROGATION—*Insurance—Damages—Action—Indemnity.*] The owner of a building insured it against fire, but not to the full value. The building was burnt by what was said to be the negligence of the servants of a municipal corporation; and the owner brought an action for damages against the corporation:—*Held* (affirming the order of the Master of the Rolls), that the owner undertaking to sue for the whole amount of damage, would be allowed to conduct the action without the interference of the insurers, but would be subject to liability for anything done by him in violation of any equitable duty towards the insurers. COMMERCIAL UNION ASSURANCE COMPANY *v.* LISTER - - - - 483

SUBSCRIBER OF MEMORANDUM—*Contributory—Fully paid-up Shares—Payment—Set-off.*] *M.* subscribed the memorandum of a company in November, 1865, for 100 £10 shares, and became a director and chairman. The 100 shares were registered in his name before March, 1866. On the 1st of March, 1866, he signed a written agreement to sell certain land to the company for £1000, and he afterwards conveyed it to the company, signing the usual receipt for the purchase-money. It did not appear that any money was ever paid to him, but his shares were treated as fully paid up. At a meeting of the company, on the 28th of March, 1866, the directors stated that they had bought property on advantageous terms, the vendors having agreed to accept £1000, part of the purchase-money, in fully paid up shares.

SUBSCRIBER OF MEMORANDUM—*continued.*
Some time after the agreement had been entered into, a minute was made in the directors' minute-book stating that 100 paid-up shares had been allotted to *M.* in payment of his purchase-money. No shares, however, were in fact allotted to him. The prospectus contained a statement similar to that in the report. The company having afterwards been ordered to be wound up, *M.* was found on the register for 100 paid-up shares, but the official liquidator applied to put him on the list of contributories for 100 other shares on which nothing had been paid. *M.*, in his affidavits, stated that he had, during the negotiation for purchase, offered to accept the £1000 in paid-up shares or to invest it in paid-up shares, and that on the completion of the purchase 100 paid-up shares were allotted to him, and received by him in satisfaction of the £1000:—*Held* (reversing the decision of *Bacon*, V.C.), that *M.* was to be treated only as the holder of fully paid-up shares, for that, on the terms of the contract and conveyance, the company were bound to pay him £1000 in cash, and that by this his liability on the 100 shares for which he signed the memorandum of association was satisfied, and that the expressions in the prospectus, the report, the directors' minute, and *M.'s* affidavits, were not sufficient to lead to the conclusion that *M.* sold to the company for 100 fully paid-up shares distinct from the shares for which he signed the memorandum. *In re* Matlock Old Bath Hydropathic Company. Maynard's Case - - - - - 60

SUBSTITUTED WAY—*Grant—Obstruction—Right to deviate—Purchaser—Notice—Injunction.*] The grantee of a right of way which has been obstructed by the grantor has a right to deviate over the grantor's land; and the grantee is entitled to have this right protected by the Court so long as the obstruction exists, without the necessity of proceeding against the grantor for the removal of the obstruction.—Notice of a right of way, and also of an obstruction to it, held to be notice of the grantee's right of deviation. Selby *v.* Nettlefold - - - - - - 111

SURRENDER OF SHARES—*Company—Special Resolution altering Articles—Contributory—Companies Act*, 1862, s. 50.] A company may by special resolution vary its articles so as to give itself power to accept surrenders of old shares in exchange for new.—Two thousand £10 shares in a company had been issued, of which 901 (called X shares) had been fully paid up, and on the other 1099 (called A shares) £2 10*s.* per share had been paid. Special resolutions were duly passed that the X shares should be cancelled, and two shares of £10 each, with £5 per share paid thereon, given in lieu of each, and that the A shares should be cancelled and one share of £10, with £5 paid, be given in lieu of every two of them. These resolutions were assented to by all the shareholders and duly registered, and the shareholders generally accepted in lieu of their old shares shares (which were called in the proceedings B shares) with £5 each paid. *T.*, a holder of A shares, having thus accepted B shares, sold and transferred them, and, in the annual lists sent to the Registrar, was treated as having then ceased to be a member. About

SURRENDER OF SHARES—*continued.*
seven years after the passing of the resolutions the company was ordered to be wound up, and the liquidator placed on the list of contributories the name of *T.*, and also the names of all the other persons who at the passing of the resolutions were holders of A shares, as well as the names of the persons who had become holders of the B shares given in lieu of them:—*Held* (affirming the order of the Vice-Chancellor of the County Palatine of *Lancaster*), that *T.'s* name must be removed from the list, for that the resolutions ought to be construed, not as purporting to oblige all the shareholders to accept B shares in lieu of their old shares, but only as empowering the directors to effect such exchange with all shareholders who wished it, and that so construed the resolutions were not *ultrà vires*, but were effectual as special resolutions altering the articles of association, and that a surrender of the old shares made in pursuance of them was valid. *In re* County Palatine Loan and Discount Company. Teasdale's Case - - - - 54

SURVIVORSHIP—Copyright—Extended term
See Prolongation of Copyright. [518

TAXATION OF COSTS—*Lower Scale—Mortgage—Amount of Debt.*] A mortgagor received an advance of £900 from a building society, and conveyed to the society property to secure the payment by him of £900 and interest in 120 instalments (amounting together to £1275), and also of certain fines and charges in the event of his failing to pay the instalments. A decree for redemption was made, the costs of the suit to be added to the security:—*Held*, that as the sum originally advanced was less than £1000, the costs must be taxed on the lower scale, and that the fines and charges which might be incurred could not for this purpose be considered as added to the sum advanced; but:—*Held*, that the scale of taxation was not dependent on the amount due when the bill was filed.—Order of *Malins*, V.C., affirmed. Cotterell *v.* Stratton - - 514

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TENANT IN COMMON—Partnership property
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—— Proceeds of sale of—Permanent improvements—Settled Estates Act - 681
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TITLE—Proof of—Ejectment suit—Admissions
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TRANSFER OF CAUSE—Suits relating to same matter—Costs - - 52, 287
See Concurrent Suits. 1, 2.

TRANSFER OF MORTGAGE—Payment of interest
See Interest on Mortgage. [541

TRANSFER OF SHARES—*Contributory—Calls Due—Paid-up Shares—Companies Clauses Act*, 1845 (8 *Vict. c.* 16), *s.* 16.] If a transfer of shares in a company subject to the *Companies Clauses Act* on which calls are due has been registered, the transfer is not, under the 16th section of the *Companies Clauses Act*, rendered invalid; the former shareholder is not a contributory, and is merely a debtor to the company for the amount of the calls; and the directors may be liable for any loss to the company occasioned by the transfer.—Order of *Malins*, V.C., affirmed. *In re* HOYLAKE RAILWAY COMPANY. *Ex parte* LITTLEDALE 257

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TRESPASS—Cutting timber—Act done to try right - - - - 116
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TORT—Action in—Injunction by Court of Bankruptcy - - - - 673
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—— Express—Trustees of mutual insurance society - - - - 495
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TRUSTEE—Appointment of new trustee—Trustee Act - - - - - 720
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—— Appointment of sole trustee—Breach of trust - - - - - 244
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—— Bankruptcy—Costs payable personally 479
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—— Bankruptcy—Disclaimer - - 586
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—— Constructive—Liability of solicitor - 244
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TRUSTEE ACTS—*Appointment of New Trustee—Female Trustee—Lunacy.*] The Court appointed an unmarried lady, aged 27, who was a relation of the *cestuis que trust* under a will, to be a trustee, there being a difficulty in finding any other suitable person to accept the office. *In re* BERKLEY. BERKLEY *v.* BERKLEY - - - 720

TRUSTEE IN BANKRUPTCY—*Practice—Payment of Costs personally.*] If a trustee in bankruptcy makes an unsuccessful application to the Court, he will, in the absence of special circumstances, be ordered to pay the costs; and if the estate is insufficient for payment of the costs, the trustee must bear them personally. *Ex parte* ANGERSTEIN. *In re* ANGERSTEIN - - 479

TRUSTEE IN LIQUIDATION—*Bankruptcy—Liquidation by Arrangement—Removing Trustee and Committee of Inspection—Bankruptcy Act*, 1869, *s.* 83, *sub-ss.* 4, 12—*Bankruptcy Rules*, 1870, *rr.* 120, 304, 305, 307.] The trustee in a liquidation by arrangement, and any member of the committee of inspection, may be removed, and others appointed, by a special resolution of the creditors, summoned under rules 304 or 305 of the *Bankruptcy Rules*, 1870. The rules in the *Bankruptcy Rules*, 1870, relating to bankruptcy, and those relating to liquidation by arrangement, are to be read as distinct codes of rules. *Ex parte* HOPKINS. *In re* HART - - - 506

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WASTE—*Trespass—Injunction—Timber.*] In 1859 *H.* brought ejectment against *S.* to recover a piece of woodland. *S.* set up adverse possession for more than twenty years, and the action was discontinued. *H.* shortly afterwards took up his residence in a house close to the wood, and frequently walked in the wood, turned cattle into it, and cut the brambles there. In 1873 he cut down a tree in the wood, and threatened to cut more, upon which *S.* filed his bill for an injunction:—*Held* (affirming the decision of the Master of the Rolls), that, after *H.* had, by bringing ejectment, admitted *S.* to be in possession of the wood, the acts done by *H.* must be looked upon only as acts of trespass not putting him into possession, and that *S.*, being in possession, was entitled to an interlocutory injunction to restrain him from cutting timber.—*Lowndes* v. *Bettle* (10 Jur. (N.S.) 226; 12 W. R. 399; 33 L. J. (Ch.) 451) approved and followed. STANFORD *v.* HURLSTONE - - - - - - 116

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WINDING-UP PETITION—*Payment of Part of Debt—Repayment—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 80, 153.] A creditor presented a petition for winding up a company. The company paid a part of the debt, and promised to pay the remainder on a certain day. This was not done, and the creditor proceeded with his petition, and a winding-up order was made upon that petition and another petition:—*Held*, that the creditor must pay back the money paid to him.—Order of the Palatine Court affirmed. *In re* Liverpool Civil Service Association. *Ex parte* Greenwood - - - - - - 511

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